83-186

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

THE STATE OF IDAHO, on relation of MARJORIE RUTH MOON, State Treasurer of the State of Idaho,

Petitioner,

vs.

STATE BOARD OF EXAMINERS, and the Legislature of the State of Idaho, by and through THOMAS W. STIVERS, Speaker of the House, and JAMES E. RISCH, President Pro-Tem of the Senate,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF IDAHO

Wayne P. Fuller
Special Assistant
Attorney General
State of Idaho
Post Office Box 130
Caldwell, Idaho 83605

(208) 459-1681

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW:

Whether state legislation which shifts the burden of supplying substanital losses from the state to the beneficiaries of the Public School Endowment Fund (hereinafter called The Fund) violate the Trust conditions established when the state was admitted to the Union and granted public lands:

1. When the Trust conditions require a permanent school fund that is to be used exclusively for education, and were intended by Congress to require the beneficiaries to"derive full benefit" of the grant;

2. When the Trust conditions include the provisions of the state constitution (Article IX, §3) which provisions were accepted, ratified and confirmed by Congress, and provide in part:

> "No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided."
>
> "The state shall supply all losses thereof that may in any manner occur."

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CASES

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

No. _____

THE STATE OF IDAHO, on relation of MARJORIE RUTH MOON, State Treasurer of the State of Idaho,

Petitioner,

vs.

STATE BOARD OF EXAMINERS, and the Legislature of the State of Idaho, by and through THOMAS W. STIVERS, Speaker of the House, and JAMES E. RISCH, President Pro-Tem of the Senate,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

MARJORIE RUTH MOON, State Treasurer of the State of Idaho, (hereafter called Petitioner) hereby Petitions that a writ of certiorari issue to review the judgment of the Supreme Court of Idaho filed March 24, 1983, and the denial of Petition for rehearing filed May 10, 1983.

OPINIONS BELOW

The opinion of the District Court of the Fourth Judicial District of the State of Idaho, Ada County, is not officially reported, but is reprinted at App. B

The opinion of the Idaho Supreme Court is officially reported at 662 P.2d 221 (Idaho 1983).

JURISDICTION

The opinion and judgment of the Supreme Court of Idaho were issued on March 24, 1983. Treasurer's timely filed Petition for rehearing was denied on May 10, 1983. (App.C) The federal questions presented herein were raised in and decided by both the trial court and the Idaho Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

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[1] The Appendix to this petition shall at all times be referred to as "App.".

CONSTITUTIONAL PROVISIONS, STATUTES AND LAWS INVOLVED

The United States Constitutional provisions involved are:

a. Article 4, Section 3, which provides the congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

b. Article 6, which provides this Constitution and the laws of the United States shall be the supreme law of the land.

The federal statutes involved are:

a. Organic Act of Territory of Idaho, 12 Stat L 808, Ch 117 (1863) Section 14.

b. Idaho Admission Act, 26 Stat L 215, Ch 656 (1890) Sections 1,4,5, and 7.

The State Constitutional and statutory provisions involved are:

Article 9, Section 3 and 4, Constitution of State of Idaho, Section 57-724, Idaho Code.

The constitutional provisions and statutes are set out verbatim in Appendix E.

STATEMENT OF CASE

In 1863 Congress enacted the Organic Act of the Territory of Idaho, 12 Stat. 808 (1863). That Act provided sections 16 and 36 in each Township were reserved for the purpose of being applied to schools in said Territory and in states thereafter erected out of the same. In 1890 Congress enacted the Idaho Admission Bill, 26 Stat. L.215 (1890). Congress has amended this act several times: 56 Stat. L.48 (1942); 63 Stat. L.714 (1949); 71 Stat. L.277 (1957) and 88 Stat. 1821, Pub. L.93-562 (1974).

Section 4 of the Admission Bill granted Sections 16 and 36 to said state for the support of common schools. Section 5 created a permanent school fund, and provided in part:

> "all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools."

Over the years the proceeds of these public lands granted to Idaho formed a significant part of The Fund.

Prior to becoming a state, the people of the Territory of Idaho on July 4, 1889, held a constitutional convention, and drafted a proposed constitution, which was adopted at an election in November, 1889. When Congress admitted Idaho as a state, Section 1 of the Idaho Admission Bill provided the State Constitution was accepted, ratified and confirmed. The State Constitution provided at the time of Idaho's admission into the Union in Article IX, Section 3, as follows:

> "The public school fund of the state shall forever remain inviolate and intact; the interest thereon only shall be expended in the maintenance of the schools of the state, and shall be distributed among the several counties and school districts of the state in such manner as may be prescribed by law. No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided. The state treasurer shall be the custodian of this fund, and the same shall

> be securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may in any manner occur."

This provision has never been amended.

In 1969, the state legislature enacted I.C. §57-724, to provide a method of computing net capital gains, based on the market value of investments as of March 25, 1969, and for a 2 year settlement date, and that all net capital losses shall be made up from an appropriation from the general fund on a biennial basis. In 1975, the state legislature amended I.C. §57-724 to provide in part:

> "In computing net capital gains or net capital losses the board shall use the marketable value of the securities as of the effective date hereof (March 25, 1969) for its computation on July 1, 1971, and shall thereafter use the difference between acquisition cost of securities and actual proceeds received from the sale of securities as the determinant of the gain or loss. Gains or lossess shall be determined for four (4) year periods, commencing on July 1, 1975. At the end of each such four (4) year period, the net amount of losses on the sale of securities, not offset by gains on the sale of securities during such period shall be computed and

> such net losses shall be made up from an appropriation from the general fund, and shall be credited to the appropriate fund." (Emphasis supplied)

Petitioner, who has served as state treasurer since 1963, found initially there were losses not supplied by the state since 1969, but thereafter discovered losses reported in 1938 going back to statehood, for which no appropriation had been made. (See Supplemental Complaint, App. D)

In December, 1975, petitioner presented a claim to the State Board of Examiners, which was denied. Thereafter, Petitioner, as custodian of the Fund, originally filed a complaint in the United States District Court for the District of Idaho (Civ. No. 1-76-72) on April 26, 1976, alleging against respondents two claims for relief for the benefit of the school children of Idaho, who are the beneficiaries of the Fund. The federal district court found the grant of public lands and the conditions of the grant in the Idaho Admission

Act presented a substantial federal question, but dismissed the case based upon the Abstension Doctrine. The Ninth Circuit Court of Appeals affirmed, 567. F.2d 858 (9th Cir. 1978) stating that the court did have jurisdicition over the suit, and while the United States does have a continuing interest in insuring that the conditions of the grant are satisfied, that state political and judicial processes had not been shown incapable of dealing with the problem. The United States Supreme Court denied certiorari,438 U.S. 915 (1978).

Petitioner then brought the present action in state district court on December 18, 1978, alleging losses to principal of $3,977,702.00 for the period from March 29, 1969, to June 30, 1973. The state district court dismissed the complaint without prejudice, construing the state statute, I.C. 57-724 so that any claims could be presented to the legislature after the four (4)

year accounting period ending July 1, 1979. The court specifically stated if the legislature fails to decline to execute its duties, then plaintiff may renew her action. The 1980 state legislature took no action, even though petitioner submitted a request to make up all losses and submitted proposed legislation.

On May 7, 1980, petitioner filed a Supplemental Complaint (App. D) which alleges the Fund has incurred and realized losses to its principal from 1931 to 1979, totaling $7,009,358.60, and losses of $6,431,593.72 due to interest that could have been earned on the principal. Petitioner raised the federal questions sought to be reviewed in the state district Court, alleging in her Supplemental Complaint that the state was: violating the conditions of the federal grant, failing to provide full benefits by making up all losses to the Fund, and offsetting

gains by losses so that the purposes of the grant were not being met. The state district court in its memorandum decision and order (See App. B.) found for petitioner, stating:

> "The Court is persuaded that the holdings in Moon v. Investment Board, 98 Idaho 200, 560 P.2d 871 (1977) and State ex rel Bottcher v. Bartling, supra, are dispositive of the pivotal issues in this case. The practical result of the procedures set forth in I.C. 57-724 is to allow the State of Idaho to 'claim benefits to itself for profits flowing to trust funds of which it is trustee and thus relieve it of its constitutional obligation as a state to keep inviolate such trust funds.' State ex rel Bottcher v. Bartling supra. The 'mere bookkeeping arrangement' devised by I.C. 57-724 enables the state to effectively divert monies from the Fund for the purpose of minimizing or negating altogether the state's obligation to 'supply all losses' as required by the Constitution. This legislatively authorized use of the Fund's assets is clearly not in furtherance of any educational purpose and is therefore incompatible with the terms of the trust agreement with the United States and contrary to the will of the people of Idaho as expressed in their Constitution. I.C. §57-724 is therefore unconstitutional." App B.

Upon appeal to the Idaho Supreme Court,

the decision was reversed in an opinion dated March 24, 1983. (See App. A.)

Rehearing was denied May 10, 1983. (App. C.)

REASONS FOR GRANTING THE WRIT:

The court below decided an important question of federal law in a manner that conflicts with the principles established in Lassen v. Arizona, 385 U.S. 458, 467-470 (1967) and earlier announced in Ervien v. United States, 251 U.S. 41, 45-48 (1919). The principles of Lassen were reaffirmed in Alamo Land & Cattle Co. v. Arizona. 424 U.S. 295, 300-303 (1976).

In Lassen, the Court adopted a doctrine that Congress required an admission act's beneficiaries to "derive the full benefit of the grant." The Court stated, at 385 U.S. 468:

> "Nothing in these restrictions is explicitly addressed to acquisitions by

> the State for its other public activities; the Enabling Act is, as we have noted, entirely silent on these questions. We must nevertheless conclude that the purposes of Congress require that the Act's designated beneficiaries 'derive the full benefit' of the grant. The conclusive presumption of enhancement which the Arizona Supreme Court found does not in our view adequately assure fulfillment of that purpose, particularly in the context of lands that as variegated and far-flung as those comprised in this grant." (Emphasis added)

In Ervien, the Court found the state legislation was a breach of trust, and indicated the use of three percent (3%) of the annual income for publicity purposes was not a purpose enumerated in the Enabling Act. The court stated, at 251, U.S. 47:

> "There is in the Enabling Act a specific enumeration of the purposes for which the lands were granted, and the enumeration is necessarily exclusive of any other purpose."

Justice Powell in this dissenting opinion in Andrus v. Utah, 446 U.S. 500 (1980), recognized the perpetual obligation to use the granted lands for public education,

stating at 446 U.S. 523-524:

> "Congress also imposed upon the State a binding and perpetual obligation to use the granted lands for the support of public education. All revenue from the sale or lease of the school grants was impressed with a trust in favor of the public schools. No state could divert school lands to other public uses without compensating the trust for the full market value of the interest taken."

The decision below is also contrary to the interpretation of the Idaho Admission Act rendered in United States v. Fenton, 27 F.Supp. 816 (D.C. Idaho 1939). In that case, the court stated, at page 817:

> "The Admission Act requires all proceeds derived from the sale of school land, 'to constitute a permanent school fund, the interest of which only shall be expended in the support of (State) schools * * * but shall be reserved for school purposes only.'"

Regarding the express purpose of the Act, the court stated, at page 818:

> "The express purpose of the Admission Act and the State Constitution is to protect and hold inviolate and intact the fund from the Acts of the Legislature or acts or failures of the officers of the State."

Regarding the Trust nature of the Fund, the court, quoting from Board of Commissioners v. State ex rel. Commissioners, 257 P.778 (Okla. 1926), stated at page 819:

> "On the other hand, the common school fund does not belong to the state, but the state merely holds such fund in trust under the conditions of the federal grant contained in the Enabling Act. The school funds were merely intrusted for the benefit of the common school, and the state pledged itself to hold such trust inviolate for the benefit of the schools."

The decision below also conflicts with the opinions in State ex rel Bottcher v. Bartling, 149 Neb. 491, 31 N.W.2d 422 (1948) and Oklahoma Education Association, Inc. v. Nigh, 642 P.2s 230 (Okla. 1982). In Bartling, the court stated, at 31 N.W.2d 417-418:

> "To permit that which the Legislature has attempted to authorize by the provision complained of would be to permit the State to be relieved of its obligation to restore losses to the perpetual school funds by a mere bookkeeping arrangement by the Board of Educational Lands and Funds over which funds the Legislature has no control

> and in which it and the State have no interest except in a supervisory capacity, and from which the State may not profit."

The court in Bartling, emphasized the federal duty, at 31 N.W.2d 428:

> "The State under the provisions of the Acts of Congress and the Nebraska Constitution herein referred to may not claim benefits to itself for profits flowing to trust funds of which it is trustee and thus relieve if of its constitutional obligation as a state to keep inviolate such trust funds.
>
> The provision of the Act in question, if a valid exercise of legislative power, would permit the offset of losses occasioned by breach of trust against profits as well as losses not involving breach of trust. No different treatment is accorded to one than the other."

In Nigh, the court stated, at 646 P.2d 235:

> "The gift of these lands and funds under the Enabling Act was accepted irrevocably by the people of Oklahoma, and such acceptance was set out in the Oklahoma Constitution under Article XI Section 1. These acceptance provisions of the Oklahoma Constitution and The Enabling Act constitute an irrevocable compact between the United States and Oklahoma, for the benefit of the common

> schools, which cannot be altered or abrogated. No disposition of such lands or funds can be made that conflict either with the terms and purposes of the grant in the Enabling Act or the provisions of the Constitution relating to such land and funds. The State has an irrevocable duty as Trustee, to manage the trust estate for the exclusive benefit of the beneficiaries, and return full value from the use and disposition of the trust property."

The Court in Nigh, also stated, at 646 P.2d 236:

> "No Act of the Legislature can validly alter, modify or diminish the State's duty as Trustee of the school land trust to adminiter it in a manner most beneficial to the trust estate and in a manner which obtains the maximum benefit in return from the use of trust property or loan of trust funds."

The decision of the court below also conflicts with the Idaho Admission Act because: the use contemplated in §57-724 I.C. violates the conditions that The Fund be used only for educational purposes and be held inviolate forever. The decision below also violates Article IX, §3, Constitution of Idaho which requires the

state to supply all losses. The provisions of the Idaho Constitution concerning school lands were accepted, ratified and confirmed by Congress in the Admissions Act. This ratification invests the state constitutional provisions with all the authority conferred by an act of Congress. Newton v. State Board of Commissioners, 37 Idaho 58, 219 Pac. 1053, (1923); McCornick v. Western Union Telegraph Co. 79F 449, 452 (8th Cir. 1897).

The decision of the Idaho court upholds legislation that uses the assets of The Fund to offset losses. The main issue determined by Idaho was who is to make up the losses to The Fund. The decision below requires the beneficiaries and their assets shall be used to make up the losses, and not the state's assets. The school children of Idaho, beneficiaries of the federal grant, are denied "full benefit" of that grant.

The decision below shifts the responsibility for supplying losses to the beneficiaries of The Fund even though the state gave its solemn promise in its constitution that it would supply all losses. The state profits from the use of an asset of The Fund when gains are used to offset losses.

The question presented is ripe for review by the United States Supreme Court. Petitioner has attempted to obtain relief for the beneficiaries of The Fund in both the federal and state courts. The decision below decides an important federal question in conflict with the applicable decisions of this Court, and in conflict with the decision of two other state courts of last resort. During these times of tight state budgets, it is important to resolve this issue. If the decision below is left to stand, it will signal a major change in this Court's long-

standing policy of carefully protecting the rights of beneficiaries of public lands granted to the states.

It is critical that the question presented be resolved as soon as possible. Petitioner, who is custodian of the Fund, and who daily buys/sells securities at the direction of the Investment Board, needs to find out if such substantial losses now and in the future are to be wiped out by a bookeeping entry. The state legislatures need a final determination about who will supply the losses to this federally created fund. Is it the State or the beneficiaries? The resolution of this question is especially important for many states in the West, which have large selections still to make of in lieu lands, (See Andrus v. Utah, supra) and will have larger sums to invest. There is also a national concern for improving education and about the amount of support needed

to do this.

Are Idaho's solemn obligations to meet the Trust conditions it undertook at the time of its admission in the Union to be shifted now to its school children?

CONCLUSION

For the reasons stated above, this Court should grant certiorari to review the Idaho Supreme Court's determination of the federal questions presented herein.

Respectfully Submitted

Wayne P. Fuller
Special Assistant
Attorney General
Post Office Box 130
Caldwell, Idaho 83605

ATTORNEY FOR PETITIONER

APPENDIX
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APPENDIX A

The STATE of Idaho, on relation of Marjorie Ruth MOON, State Treasurer of the State of Idaho, Plaintiff-Respondent, Cross-Appellant,

v.

STATE BOARD OF EXAMINERS, and the Legislature of the State of Idaho, By and Through Thomas W. Stivers, Speaker of the House, and James E. Risch, President Pro-Tem of the Senate, Defendants-Appellants, Cross-Respondents.

No. 14060.
Supreme Court of Idaho.
March 24, 1983.
Rehearing Denied May 10, 1983.

State treasurer brought action seeking an order requiring the legislature to reimburse public school endowment fund for losses incurred on individual security trades. The Fourth Judicial District Court, Ada County, Jesse R. Walters, J., granted partial summary judgement in favor of the state treasurer, and appeal was taken. The Supreme Court, Huntley, J., held that statute permitiing offsetting of capital gains against capital losses at the end of a four-year accounting period did not violate constitutional provision mandating that losses suffered by public school endowment fund be reimbursed by legislative appropriations.

Reversed.

Bistline, J., filed dissenting opinion.

Schools 10

Statute permitting offsetting of capital gains against capital losses at the end of a four-year accounting period did not violate state constitutional provision mandating that losses suffered by public school endowment fund be reimbursed by legislative appropriations. Const. Art. 9, § 3; I.C. § 57-724.

Jim Jones, Atty. Gen., Lynn E. Thomas, Sol. Gen., Steven

M. Parry, Deputy Atty. Gen., Boise, for defendants-appellants, cross-respondents.

Wayne P. Fuller, Sp. Asst. Atty. Gen., Caldwell, for plaintiff-respondent, cross-appellant.

HUNTLEY, Justice.

The Idaho Constitution mandates that losses suffered by the Public School Endowment Fund (the "fund") be reimbursed by legislative appropriation. Article 9, § 3 states:

> "Public school fund to remain intact.— The public school fund of the state shall forever remain inviolate and intact; the interest thereon only shall be expended in the maintenance of the schools of the state, and shall be distributed among the several counties and school districts of the state in such manner as may be prescribed by law. No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided. The state treasurer shall be the custodian of this fund, and the same shall be securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may in any manner occur."

By this appeal we are asked to determine whether the legislative implementation of an accounting procedure for computing the extent of capital losses, if any, through the accounting method set forth in I.C. § 57-724, passes constitutional muster[1].

[1] I.C. § 57-724. "Distribution of income from investments—Determination of net capital gains or losses.—The board shall distribute the income from the investments of securities in accordance with this act. For the purposes of this act, income shall not include capital gains derived from the sale of investments or securities. In computing net capital gains or net capital losses the board shall use the marketable value of the securities as of the effective date hereof [March 25, 1969] for its computation on July 1, 1971, and shall thereafter use the difference between acquisition cost of securities and actual proceeds received from the sale of securities as the determinate of the gain

The Fund is managed and invested by the Endowment Fund Investment Board which invests a portion of the funds in authorized corporate stocks, bonds, and debentures.

This action was originally filed in the U.S. District Court for the State of Idaho. The District Court's dismissal of the complaint upon the abstension doctrine was affirmed by the Ninth Circuit Court of Appeals. Thereafter plaintiff filed her complaint in state district court, challenging the offset procedure dictated by I.C. § 57-724. The complaint was dismissed without prejudice by the district court on April 30, 1979, for lack of a justiciable controversy. In dismissing the complaint, the district court stated: "If the legislature fails or declines to execute its duties by accomplishing the purpose and intent of I.C. § 57-724, following July 1, 1979, then the plaintiff may renew her action."

The endowment fund investment board issued copies of its audit report and financial statements to each member of the legislature on January 4, 1980. The audit report indicated that there had been a $1,359,000 gain to the public school fund, and thus there were no losses to be made up. The auditors, for purposes of ascertaining whether there was a gain or loss to the fund, used the procedure provided in I.C. § 57-724. The treasurer asserts that if proper and constitutional accounting methods were used, there are losses to be made up of $7,009,385.60 principal and $6,431,593.72 interest.

Following adjournment of the 1980 session of the legislature, respondent filed a supplemental complaint seeking an order

or loss. Gains or losses shall be determined for four (4) year periods, commencing on July 1, 1975. At the end of each such four (4) year period, the net amount of losses on the sale of securities, not offset by gains on the sale of securities during such period shall be computed and such net losses shall be made up from an appropriation from the general fund, and shall be credited to the appropriate fund. All net income or net losses from the investments or securities shall be distributed to each participating fund in the same rates as each fund's average daily balance bears to the total average daily balance of all participating funds, provided, losses of the public school fund shall be maintained separate from all other funds as required by section 3 of article 9 of the Idaho Constitution."

requiring the board of examiners to allow the claims and requiring the legislature to reimburse the fund. The state board of examiners and the legislature filed a motion to dismiss, asserting that they had complied with the court's earlier order and that the complaint failed to state a claim. The district court denied appellants' motion to dismiss, granted a partial summary judgment to the respondent, denied appellants' motion to reconsider and this appeal followed.

The specific issue on appeal is whether, as contended by the Treasurer and held by the trial court, the loss on each individual security trade must be reimbursed, or whether it is constitutionally proper, as per I.C. § 57-724, and as contended by the Board and the appellants, to offset capital gains against capital losses to determine whether there has been either a net loss or a net gain during the four-year accounting period.

Article 9, § 3 of the Idaho Constitution requiring the legislature to supply all losses to the Fund is not self-executing—rather it requires implementing legislation. In *Moon v. Investment Board*, 96 Idaho 140, 143, 525 P.2d 335, 337 (1974), we stated:

> "Implementation of constitutional principles is an appropriate function of legislation, and unless such implementing legislation is clearly in violation of the constitutional principle, it is a valid exercise of the legislative power...."

The question becomes, is the method of computing losses as contained in Article 9, § 3 in violation of a constitutional provision? We hold that it is not and reverse the judgment of the district court.

The public school endowment fund is a trust, the principal of which is derived primarily from the sale or lease of lands designated exclusively for school purposes. Idaho's admission to the federal Union was conditioned upon the creation of a permanent school fund. Idaho accepted this condition of admission to the union by enacting Article 9, § 3 of the Idaho Constitution. *Duchesne County v. State Tax Comm'n*, 104 Utah 365, 140 P.2d 335 (Utah 1943), held that an agreement whereby an Admission Act makes a gift to the State of certain government

lands and makes the proceeds from the sale of such lands a permanent fund, the interest only of which is to be expended for support of common schools, and which gift is accepted by a reciprocal provision of the state constitution creating the states' school fund, amounts to the creation of an express trust of which the state is trustee and guarantor of the trust estate against loss.

The Fund is a trust of the most sacred and highest order. See *State v. Peterson,* 61 Idaho 50, 97 P.2d 603 (1939); I.C. § 57-715. In *United States v. Fenton*, 27 F.Supp. 816 (D.Idaho 1939), the court stated:

> The express purpose of the Admission Act and the State Constitution is to protect and hold inviolate and intact the fund from the Acts of the Legislature or acts or failures of the officers of the State." 27 F.Supp. at 818.

In *Moon v. Investment Board, supra,* we quoted from the proceedings and debates of the Idaho Constitutional Convention (1889), Vol. I, at 647, as instructive in ascertaining the intent of the Constitutional Convention in drafting article 9, § 3, as follows:

> "Mr. McCONNELL: Mr. Chairman, I think no fund is more sacred than the school fund, and perhaps there is no other fund so sacred; it should be guarded in every manner possible, and by having this provision in here, the children will always be made sure there will be that much money to their credit, and we will have that much at stake in our schools. But if there is no provision for making this fund good in every way, it may be squandered, and the first thing we know our school fund will be so small that we can only maintain the schools by local taxation. I think the legislature can provide for making good any losses which may occur. They will probably be more careful in making investments if it is known that the state has to make it good."

We held that this indicated that the Constitutional Convention intended the legislative branch of the government should have control over the fund and as an incentive to making sound investments, the convention provided that the legislature would have to make good all losses. A logical and common sense

reading of the method used to compute losses as codified in I.C. § 57-724 leads us to the conclusion that this method does not violate the constitutional mandate. To require the legislature to make up losses incurred on each security sale might well act to the detriment of the school children of Idaho. It would unduly restrict the Endowment Fund Investment Board.

For example, the Fund frequently holds bonds, which if held to maturity would yield a certian profit, but which if sold before maturity at a loss, and with the proceeds elsewhere reinvested, would yield a higher long range profit. This flexibility and opportunity for higher profit would likely not be exercised if the legislature would be forced to make up the loss of the sale of the bonds.

The result contended for by the treasurer would have us interpret the terms "capital gains" and "interest" as being synonymous. Noting that the constitution provides the "*interest* thereon only shall be expended in the maintenance of the schools...," she argues that to offset capital gains and capital losses would be to in effect spend the gains other than for school purposes. However, the constitution does not specify how losses shall be computed. It does not define capital gains and interest as being synonymous term ; and we decline to do so.

We have reviewed the decision in *State ex rel. Bottcher v. Bartling*, 149 Neb. 491, 31 N.W.2d 422 (1948), relied on by the district court and respondents. There is a significant difference in the wording of the Nebraska Constitution interpreted therein and the wording of the Idaho Constitution.

With regard to the public school fund, the Nebraska Constitution makes no distinction between interest income and capital gain, but simply provides that *all*

> "*income* arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations. 31 N.W.2d at 426 [Emphasis added.]."

In contrast, the Idaho Constitution provides that the portion of income represented by interest is to be spent on the maintenance of the schools. The *Bartling* decision merely stands for the proposition that capital gains are income to a public

school fund and is not germain to interpreting the effect of the very different language of the Idaho Constitution.

Accordingly, we hold that I.C. § 57-724, permitting the offsetting of capital gains against capital losses at the end of a four-year accounting period, is in keeping with the constitutional mandate of Article 9, § 3, of the Idaho Constitution. Under I.C. § 57-724, the net capital gains at the end of each four-year period become part of principal and then become inviolate.

It is to be noted that the legislative duty to offset losses occasioned by a breach of trust, or other mechanisms not placed in issue by the appeal, are not addressed by this decision. The requirement of Article 9, § 3, is that the Public School Endowment Fund be kept inviolate. The accounting procedure adopted by the legislature in I.C. § 57-724 satifies that mandate.

The judgment is reversed.

DONALDSON, C.J., and SHEPARD and BAKES, J.J., concur.

BISTLINE, Justice, dissenting.

If I correctly understand the Court's resolution of the very narrow issue presented, it is that the Court, overwhelmed with the State's responsibility to recompense the public school endowment fund for over $13,000,000 in losses, has arrived at a decision based on policy rather than constitutional law. As a preface to this dessent, it is important to note that it is not this Court's role to amend the Constitution or to uphold legislative enactments which have that same effect. If the Idaho Constitution is to be amended, the legislature alone can initiate an amendment in accordance with Idaho Constitution, article 20, section 1:

> "Any amendment...to this Constitution may be proposed in either branch of the legislature, and if the same shall be agreed to by two-thirds (2/3) of all the members of each of the two (2) houses, ...such proposed amendment.../shall be submitted/ to the electors of the state at the next general election...and if a majority of the electors shall ratify the same, such amendment...shall become a part of this

Constitution."

The experience recently gained at the last (1982) general election suggests that the legislature could reasonably expect favorable voter reaction to a proposed amendment. The legislature, however, has not gone that route, and I submit that it is not for this Court, the members of which are sworn to uphold our Constitution, to condone legislation beyond the pale of the Constitution—even though the thing sought to be accomplished would undoubtedly appear attractive to private enterprise dealing in its own finances.

Upon its admission into the Union, Idaho was granted by the United States land sections numbered 16 and 36 in every township in the state or sections in lieu thereof "for the support of common schools." 26 Stat.L. 215, ch. 656 § 4 (Idaho Admission Act). The Idaho Admission Act required that "all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools." 26 Stat.L. 215, ch. 656, § 5. The Idaho Admission Act declared that "the constitution which the people of Idaho have formed for themselves be, and the same is hereby accepted, ratified, and confirmed." 26 Stat.L. 215, ch. 656, § 1. The Idaho Constitution, which was at that time confirmed by Congress, contained the following provision regarding the public school fund established with the proceeds from the United States land grant:

> "Public school fund to remain intact.—The public school fund of the state shall forever remain inviolate and intact; the interest thereon only shall be expended in the maintenance of the schools of the state...*No part of this fund*, principal or interest, *shall* ever be transferred to any other fund, or *used or appropriated except as herein provided*. The state treasurer shall be the custodian of this fund, and the same shall be securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may *in any manner occur*." Id. Const. art. 9, § 3 (emphasis added).

The money held in this public school endowment fund are not

monies held by the State in its sovereign capacity but are held by the State only *in a trust capacity* for future generations of Idaho school children. The State's responsibility in administering this trust was recognized in *United States v. Fenton*, 27 F.Supp. 816 (D.Idaho 1939):

> "*[T]* State holds the Public School fund in trust under the conditions of a National Act and the constitution of the State and not as its property. The Supreme Court of Oklahoma explains clearly this distinction in the case of *Board of Commissioners of Woods County v. State ex rel. Com'rs,* 125 Okl. 287, 257 P. 778, 779, 53 A.L.R. 1128, where it is said: 'There is a distinction between right accruing to the state in handling revenues belonging to it and the rights of the state arising from control of the common school fund, held in trust by the state. The revenues belonging to the state in its sovereign capacity are a part of its property, and so long as the state keeps within constitutional limitations it may deal with its property as it sees fit. On the other hand, the common school fund *does not belong to the state,* but the state merely holds such fund in trust under the conditions of the federal grant contained in the Enabling Act. The school funds were merely intrusted for the benefit of the common school, and the state pledged itself to hold such trust inviolate for the benefit of the schools.***' See *In re Loan of School Fund*, 18 Colo. 195, 32 P. 273.
>
> "As both the Admission Act and the State Constitution grants in trust Public school lands, the proceeds from the sale thereof naturally remains as a part of the Trust, and that the conditions are inviolable conditions which were accepted by the State. The State cannot violate these conditions nor dissipate such funds..." *Id.* at 819 (emphasis added).

These permanent school funds have long and consistently been regarded by the courts as trust funds of the highest and most sacred order. *United States v. Fenton, supra; Moon v. Investment Board,* 96 Idaho 140, 525 P.2d 335 (1974); *State v. Peterson*,

61 Idaho 50, 97 P.2d 603 (1939). I.C. § 57-715 similarly declares that "/p/ermanent endowment funds of the state of Idaho are hereby declared to be trust funds of the highest and most sacred order and shall be controlled, managed and invested...in accordance with the highest standard..."

The legislature, however in 1969, enacted I.C. § 57-724, which purports to relax the trust responsibility established by the Idaho Constitution. That enactment in pertinent part provides:

> "At the end of each such four (4) year period, the net amount of losses on the sale of securities, not offset by gains on the sale of securities during such period shall be computed and such net losses shall be made up from an appropriation from the general fund."

Although the Constitution provides that "/t/he state shall supply all losses /from the fund/ that may in any manner occur," I.C. § 57-724 would nullify that with the provision that at the end of four-year intervals the state is only required to replace "such net losses on the sale of securities, *not offset by gains*..." (Emphasis added.) The Constitution dictates otherwise, and directs that the state recompense the fund for all losses that may occur "in any manner."

The Court finds that since this constitutional provision is not self-executing, a premise which may be accepted *arguendo*, implementing legislation cannot violate the command of the Constitution. It is said today that I.C. § 57-724 provides a *reasonable* means for carrying out the constitutional mandate. On today's money market, obviously not at all like that which existed at the turn of the nineteenth century, absent a Constitution, reasonableness is apparent. But article 3 of the Constitution simply does not endow the legislature with the right to determine for itself that a profit and loss statement may encompass a four-year period. The Constitution is clear and unequivocal that "/n/o part of this fund, principal or interest, shall *ever* be transferred...or used or appropriated *except as herein provided.*" For certain, the legislature is without any authority—no matter how keenly its collective judgment is attuned to the recent money market—to set up a four-year

period, a ten-year period, or any period whwerein investment losses will be deducted from investment gains to arrive at the net losses it shall supply under the constitutional mandate.[1] The Constitution did not so contemplate. Instead, "[t]he state treasurer shall be the custodian of this fund, and the smae shall be securely and profitably invested as may be by law directed." Undoubtedly, the framers were aware that in making investments there might be some losses, but, rather than providing for an offset against the gains as is the legislative proposition here at issue, they went on in the very next sentence to provide: "The state shall supply *all* losses thereof that may *in any manner occur.* (Emphasis added.)

The majority determines that the method for computing losses found in I.C. § 57-724 does not violate the constitutional provision requiring the State to reimburse the public school endowment fund for "all losses." However, the majority ignores that part of the Constitution which requires that "[n]o part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided." This provision prohibits the transfer, use, or appropriation of "capital gains" for any other purpose than is provided in the Constitution itself. The Constitution does not provide that capital gains may be used to offset capital losses. The majority, in another part of its analysis, finds that cpaital gains do not constitute "interest" and so do not have to be used solely for "the maintenance of the schools of the state." Even adopting, *arguendo,* the conclusion that capital gains do not constitute "interest," it still does not follow that capital gains do not constitute "principal" and so are similarly prohibited from being transferred or used or appropriated except as constitutionally provided. The Constitution divides the public endowment fund into two categories: "principal or interest." Whichever category

[1] "The expression 'forever remain inviolate and intact' would not mean ten or any number of years that may be enacted into a statue, but it means forever." *United States v. Fenton, 27 F.Supp. 816, 818 (D.C.Idaho 1939).*

capital gains fall into, principal or interest, the Constitution is clear: they may not be used or appropriated to offset capital losses.

The Court opts for what it sees as "a logical and common-sense" approach to constitutional construction. It declines to be persuaded by compelling precedent. The United States Supreme Court in *Lassen v. Arizona*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967), examined Congress'concern with permanent school endowment funds created by land grants to the states:

> "All these restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust.
>
> ...
>
> "[The] premise [involved] was that the grants cannot 'be too carefully safeguarded for the purpose for which they are appropriated.' Senator Beveridge described the restrictions as 'quite the most important item' in the Enabling Act, and emphasized that his committee believed that 'we were giving the lands to the States for specific purposes, and that restrictions should be thrown about is *which would assure* its being used for those purposes.' " 385 U.S. at 467-68, 87 S.Ct. at 589 (emphasis added) (footnote omitted).

Congress, in granting lands to the states, sought to *insure* the educational needs of future generations of children. Its premise "was that the grants cannot 'be too carefully safeguarded...' " The Idaho Court, however, looks not to the aspect of safeguarding the permanent endowment fund, but finds succor in its own four-member rationale that "[t]o require the legislature to make up losses incurred on each security sale *might well* act to the detriment of the school children of Idaho," and "would *unduly restrict* the Board of Examiners." Concededly, as against investing in the private sector, the Constitution is restrictive. And so it was intended, and so it was worded. The Court would properly say, "so be it." If the legislature is not satisfied with

the Constitution as written and ratified by the people, change can come through procedures which are within constitutional limitations.

The result opted for by today's Court flies in the face of precedent, obviously a matter given scant concern by the majority. As early as 1897, this Court in *State v. Fitzpatrick*, 5 Idaho 499, 51 P. 112 (1897), held that the usury laws did not apply to a loan of the public school endowment fund. The Court in so holding stated:

> "The people, throughout the constitution, have thus declared for what purpose all interest on the permanent fund shall be applied. No part of it can be expended in the payment of forfeitures or penalties imposed by the statute law of the state. *Any law enacted by the legislature diverting one dollar of principal or interest of said fund to other purposes would be unconstitutional...* The constitution expressly prohibited the legislature from enacting a law that would divert one dollar of said funds otherwise than as provided by the constitution.
>
> "In the face of those solemn provisions of the constitution, it is sought in this action to impose a forfeiture or penalty of $560 out of accrued interest earned by $2,000 of the permanent school fund, which interest, the constitution declares, must be distributed to the schools throughout the state; and also to reduce the permanent fund $133.44, which fund, the constitution has declared, must be kept inviolate and intact. *The legislature cannot thus do indirectly what it is prohibited from doing directly.*" *Id.* at 507, 51 P. at 114 (emphasis added).

The Court today does just that—it upholds a law which indirectly takes money from the permanent school fund by allowing the Board to offset losses which the State would otherwise have to supply from the general fund. In *Fitzpatrick*, the relief requested was merely for an offset of a $560 statutory usury penalty to be made from the $2,000 interest that was made on a usurious loan. The Court would not allow it. Such an offset should not be allowed today.

The language and reasoning used by the Court in Fitzpatrick was reaffirmed by this Court in *State v. Peterson*, 61 Idaho 50, 97 P.2d 603 (1939), wherein it was held that the statute of limitations did not bar an action to foreclose a mortgage given to secure a loan from the public school endowment fund. The Court there stated:

> "Thus these public school endowment funds are trust funds of the highest and most sacred order, made so by Act of Congress and the Constitution, so considered by the members of the Constitutional Convention...and so recognized and declared by this court." *Id.* at 53-54, 97 P.2d at 604.

The Court similarly fails to take note of this Court's recent decision in *Moon v. Investment Board*, 98 Idaho 200, 560 P.2d 871 (1977). In that case, the Investment Board had, pursuant to appropriations by the legislature, transferred $100,000 interest income earned by investment of public school endowment funds into the Investment Board Expense Fund to defray expenses of investing those assets by the investment board. The Court held this action unconstitutional:

> "The sole issue presented by plaintiff's petition is whether or not the legislature may constitutionally appropriate and authorize a portion of the earnings from the investment of the public school funds to be transferred to and used by the Investment Board Expense Fund to defray the expenses incurred by the Investment Board in the investment of the public school fund. It is our opinion that the legislation authorizing this practice and the practice itself, is in violation of Article 9, § 3, of the Constitution of the State of Idaho." 98 Idaho at 202, 560 P.2d at 872 (citing *State v. Fitzpatrick*, 5 Idaho 499, 51 P. 112 (1897) among other cases.

It is interesting to note that the Court in adopting this position was not then persuaded by the argument made by a dissenting justice:

> "I find it hard to conceive that the drafters of the Constitution, while specifically providing that the corpus

of the Public School Fund should remain 'inviolate' and requiring the makeup of all losses to said fund, also meant that the *gross* earnings from the investments are similarly 'inviolate' from any costs reasonably incurred in the investment process. I realize the the language of the Constitution:

> 'No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided'

could be so construed, however, I do not believe that such a narrow construction of that clause is either necessary or desirable." *Id.* at 201, 560 P.2d at 872 (Shepard, J., dissenting)(emphasis in original)

The Court today again achieves an aurora of being consistently inconsistent, to the extent of once again breaking with precedent, and in this instance rewriting the Constitution. What may be even more interesting to note is that the dissent in the 1977 *Moon* case addressed the very issue with which the Court is faced today:

> "Here there is no argument but that the monies so appropriated by the legislature were reasonably necessary to and represent the reasonable expenses incurred by the Board in its investment duties. There can be no argument that such legislation is merely a ruse to allow invasion of the corpus of the school fund since *the Constitution also requires that any losses to that fund, occasioned by investment,* will be by the legislature made up to the Public School Fund. See *Moon v. Investment Board* [96 Idaho 140, 525 P.2d 335]." *Id.* (Emphasis added.)

The Court attempts to distinguish this case from *Bottcher v. Bartling*, 149 Neb. 491, 31 N.W.2d 422 (Neb. 1948), which Judge Walters found to be "virtually in point regarding the legitimacy of offsetting gains and losses from a permanent school fund," saying:

> "We have reviewed the decision in *State ex rel. Bottcher v. Bartling* [149 Neb. 491], 31 N.W.2d 422 (1948), relied on by the district court and respondents. There is a significant difference in the wording of the Nebraska

Constitution interpreted therein and the wording of the Idaho Constitution.

"With regard to the public school fund, the Nebraska Constitution makes no distinction between interest income and capital gain, but simply provides that *all*

'income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations. 31 N.W.2d at 426. [Emphasis added.].'

In contrast, the Idaho Constitution provides that the portion of income represented by interest is to be spent on the maintenance of the schools. The *Bartling* decision merely stands for the proposition that capital gains are income to a public school fund and is not germain to interpreting the effect of the very different language of the Idaho Constitution." Majority Opinion at 223—224.

Confessing my inability to understand and apply this analysis, I cannot argue against it. I do comprehend that which the *Bartling* court said:

"The particular complaint of the plaintiff is that the Legislature was without constitutional power to provide that in case of sales of bonds held in the various funds under the management and trusteeship of the Board of Educational Lands and Funds for more than the par value of such bonds, the difference between the par value and the selling price should be set up as a capital reserve to offset past capital losses.

...

"With a clear design to preserve and protect the grant of lands made by the United States to Nebraska for support of common schools and the benefits flowing therefrom, a provision was placed in the Constitution of 1866, which was the first state Constitution, in part as follows: 'The principal of all funds arising from the sale or other disposition of lands or other property granted or intrusted to this State, for educational and religious purposes, shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the

specific objects of the original grants or appropriations.' Const. 1866, art. VII, § 1.

...

" 'All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, and the state shall supply all losses thereof, that may in any manner accrue, so that the same shall remain forever inviolate and undiminished; ***.' Const. art VII, § 9.

...

"By the provision complained of the Legislature sought to relieve the State from its constitutional obligation to supply all losses to the perpetual school funds. We have not been cited to any precedents and we think there are none which would permit the Legislature in such manner to override and render for naught the will of the people as expressed through the Constitution. It is fundamental that in case of a conflict between the Constitution and a legislative enactment the statute must give way to the Constitution. The Constitution is the paramount of law. Where there is a conflict between an act of the Legislature and the Constitution of the State, the statute must yield to the extent of the repugnancy. [Citations omitted.]

"To permit that which the Legislature has attempted to authorize by the provision complained of would be to permit the State to be relieved of its obligation to restore losses to the perpetual school funds by a mere bookkeeping arrangement by the Board of Educational Lands and Funds over which funds the Legislature has no control and in which it and the State have no interest except in a supervisory capacity, and from which the State may not profit.

"The State under the provisions of the Acts of Congress and the Nebraska Constitution herein referred to may not claim benefits to itself for profits flowing to trust funds of which it is trustee and thus relieve it of its constitutional obligation as a state to keep inviolate such trust funds.

"The provision of the Act in question, if a valid exercise of legislative power, would permit the offset of losses occasioned by breach of trust against profits as well as losses not involving breach of trust. No different treatment is accorded the one than the other.

"Even in the absence of constitutional obligation upon the trustee to restore funds, as it is true here, a trustee would not be permitted to offset losses occasioned by his breach of trust against profits and no valid statute could be enacted legalizing any such transaction.

"The rule in this connection is well stated in Restatement, Trusts, § 213(b), p. 595, as follows: 'If the trustee is liable for a loss occasioned by a breach of trust in respect of one portion of the trust property, he cannot reduce the amount of his liability by deducting the amount of gain which has accrued with respect to another part of the trust property through another and distinct transaction which is not a breach of trust.'

"This proposition is fundamental in the law of trusts and it would therefore be necessary, even in the absence of constitutional obligation of the State to supply the losses to the perpetual school funds, to say that the provision permitting offset of past losses against profits would not be a valid exercise of legislative power.

"A grant of specific power by the Legislature is contrary to and out of harmony with the fundamental law is unconstitutional and void. *Scott v. Flowers* [61 Neb. 620, 85 N.W.857], supra; *Tiernan v. Rinker*, 102 U.S. 123, 26 L.Ed. 103." 31 N.W.2d at 425—28.

Joining company with Judge Walters, I find the *Bartling* opinion well-reasoned and persuasive. Even without that case, however, my view is that the Court today could have readily, properly and wisely adopted the district court's opinion as its own.

As noted by the majority, this case was initially filed in the United States District Court for the State of Idaho. That court dismissed the complaint on the basis of federal court abstention. This dismissal was upheld on appeal to the Ninth Circuit. *State*

of Idaho v. State Board of Examiners, 567 F.2d 858 (9th Cir. 1978), *cert. denied*, 438 U.S. 915, 98 S.Ct. 3144, 57 L.Ed.2d 1160. The Ninth Circuit found that the dismissal was warranted for the purpose of conserving judicial resources. However, the court in so holding did find that the case involved a substantial federal question:

> "In this case, however, we have more than mere ratification of state-created rights. As the district court noted, this suit concerns conditions attached to the grant of public lands to the state of Idaho. Hence, a substantial federal question is presented, and the district court correctly found subject matter jurisdiction." *Id.* at 859.

I take solace in the fact that Ms. Moon may appeal today's decision to the federal courts and relitigate this "substantial federal question" to insure that the public school endowment fund does in fact "forever remain inviolate and intact." Id. Const. art. 9, § 3.

APPENDIX B

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, on relation of MARJORIE RUTH MOON, State Treasurer of the State of Idaho
Plaintiff,
—vs—
STATE BOARD OF EXAMINERS, and the Legislature of the State of Idaho, by and through RALPH OLMSTEAD, Speaker of the House, and REED W. BUDGE, President Pro-Tem of the Senate,
Defendants.

Case No. 66087

MEMORANDUM DECISION AND ORDER

APPEARANCES:

For the Plaintiff: WAYNE P. FULLER
Special Assistant Attorney General

For the Defendant: STEVEN MICHAEL PARRY
Deputy Attorney General

• • •

In this action the plaintiff, as the constitutionally designated custodian of the Public School Endowment Fund (hereinafter "Fund" or "permanent school fund") seeks to have the defendants approve and appropriate money from the State's

general revenues to reimburse the Fund for certain monetary losses alleged to have occured since 1931. The action is founded upon Idaho Constitution Art. 9, Sec. 3 which directs the legislature to supply all losses to the permanent school fund, and I.C. 57-724 which spells out the method by which such losses are to be computed.

Idaho Constitution Art. 9, Sec. 3 provides:

> "Sec. 3. **Public school fund to remain intact.**— The public school fund of the state shall forever remain inviolate and intact; the interest thereon only shall be expended in the maintenance of the schools of the state, and shall be distributed among the several counties and school districts of the state in such manner as may be prescribed by law. No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided. The state treasurer shall be the custodian of this fund, and the same shall be securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may in any manner occur."

Although the state treasurer, plaintiff herein, is the custodian of school funds, the authority to invest and manage school funds is allocated to an investment board by the provisions of Chapter 7, Title 57, Idaho Code. **Moon v. Investment Board**, 96 Idaho 140, 525 P.2d 335 (1974).

Section 57-724 of the Idaho Code referring to the duties of the Investment Board currently provides:

> "**57-724. Distribution of income from investments — Determination of net capital gains or losses.**— The board shall distribute the income from the investments or securities in accordance with this act. For the purposes of this act, income shall not include capital gains derived from the sale of investments or securities. In computing net capital gains or net capital losses the board shall use the marketable value of the securities as of the effective date hereof (March 25, 1969) for its computation on July 1, 1971, and shall thereafter use the difference between acquisition cost of

securities and actual proceeds received from the sale of securities as the determinant of the gain or loss. Gains or losses shall be determined for four (4) year periods, commencing on July 1, 1975. At the end of such four (4) year period, the net amount of losses on the sale of securities, not offset by gains of the sale of securities during such period shall be computed and such net losses shall be made up from an appropriation from the general fund, and shall be credited to the appropriate fund. All net income or net losses from the investments or securities shall be distributed to each participating fund in the same rates as each fund's average daily balance bears to the total average daily balance of all participating funds, provided, losses of the public school fund shall be maintained separate from all other funds as required by section 3 of article 9 of the Idaho Constitution."

This is the second time that the instant controversy has been before the Court. The original Complaint was filed on December 8, 1978. In a Memorandum Decision issued on April 30, 1979, this Court dismissed the plaintiff's action without prejudice due to the absence of a justiciable controversy. The basis of the Court's holding revolved around the language of I.C. Sec. 57-724, supra, which effectively gave the legislature a period of time until the adjournment of the 1980 legislative session in which to act upon claims submitted to it by plaintiff through the State Board of Examiners. The Court found that inasmuch as the 1980 Session had not yet even convened at the time of the hearing on the original complaint, the plaintiff's cause of action was premature and properly dismissable.

During the 1980 Session of the Idaho legislature, the plaintiff formally submitted an independently audited accounting of the Fund's investment gains and losses as required by law. Idaho CodeSec. 57-725. This report has been attached as Exhibit A to the Affidavit of William G. Hepp, the Investment Manager of the Endowment Investment board and presented to the Court for review in this case. The report concluded that between March 25, 1969, and June 30, 1979, the Fund's investment gains

exceeded its losses by $1,359.000 (Gains and losses occurring prior to March 25, 1969 are not addressed by I.C. Sec. 57-724 and in the absence of enabling legislation to effectuate the constitutional dictates of Art. 9, Sec. 3, there is currently no authority for the legislature to consider the need to reimburse the fund for that time period. See the discussion in **Moon v. Investment Board**, 96 Idaho 140, 525 P.2d 333 (1974), holding that while the legislature cannot avoid its responsibility to supply "all losses" to the Fund, it has the inherent discretion to approach this obligation in a piecemeal manner by enacting limited laws such as I.C. 57-724.) The legislature, in reviewing the auditor's report of 1980 concluded that no "loss" had occurred and therefore took no action to reimburse the Fund.

The plaintiff disagreed with the legislature's interpretation of the auditor's report and following the adjournment of the 1980 session of the legislature, filed a Supplemental Complaint seeking an order from this Court requiring the State Board of Examiners to allow the claims for losses and requiring the legislature to reimburse the Fund. The defendants filed a Motion to Dismiss the Supplemental Complaint on the ground that the legislature had properly complied with its constitutional and statutory responsibilities with respect to the Fund in concluding that the Fund had not incurred losses necessitating reimbursement and contending therefore that the plaintiff was not entitled to the relief sought.

In as much as matters outside of the pleadings in the form of affidavits, responses to discovery, a deposition, and exhibits were presented to the Court for consideration in respect to the Motion to Dismiss, and because the determination made herein is one of law, and because there are not any issues of material fact in dispute in this case, the Motion will be treated and disposed of as one for summary judgment. **Rush v. G-K Machinery Co.**, 84 Idaho 10, 367 P.2d 280 (1961); **Boesigner v. DeModena**, 88 Idaho 337, 339 P.2d 635 (1965); **Coddington v. Lewiston**, 96 Idaho 135, 525 P.2d 330 (1974). Under appropriate circumstances, such as exist in this case, the Court is empowered to enter a summary judgment pursuant to Rule

56 as a matter of law against the movant and in favor of the non-moving party. **Fountain v. Filson**, 336 U.S. 681, 93 L.Ed. 971, 69 S.Ct. 754 (1949); Moore's Federal Practice, 2d Ed. Vol. 6, pg. 2089; Annotation 48 A.L.R.2d 1188 (1956).

The plaintiff's position throughout these proceedings has been that *all* investment losses, irrespective of contemporaneous accounting period gains, must be supplied to the Fund by the legislature. The defendants have maintained that the legislature has the discretion to determine precisely how losses should be defined and supplied and that the provisions of I.C. 57-724 allowing the offsetting of gains against losses in order to ascertain the existence of a loss requiring reimbursement is a constitutionally sound exercise of the legislature's inherent power. See **Idaho Gold Dredging Co. v. Balderston**, 58 Idaho 692, 78 P.2d 105 (1938).

The issue in this case, therefore, is whether the procedure prescribed in I.C. 57-724 is valid with regard to the Fund. Although the present action differs materially from the declaratory judgment sought in **Moon v. Investment Board**, 96 Idaho 140, 525 P.2d 335 (1974), this action will also necessitate the Court examining the constitutionality of the current version of I.C. 57-724.

A brief review of the history underlying the Fund is critical to understanding the ultimate determination of this Court. The origin of the permanent school fund dates back to statehood. Sections 4 and 5 of the Idaho Admission Act, 26 Statutes at Large 215, ch. 656 (1890), condition Idaho's admission to the federal Union upon the creation of a permanent school fund, the res of which was to be derived primarily from the sale or lease of lands designated exclusively for school purposes. Section 4 reads:

> "**School lands.**—Sections numbered 16 and 36 in every township of said state, and where such sections or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said state

for the support of common schools, such indemnity lands to be selected within said state in such manner as the legislature may provide, with the approval of the secretary of the interior."

Section 5 provides in pertinent part:

"**Sec. 5. Sale or lease of school lands.**—(a) Except as provided in subsection (b) all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. Such lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than ten years, and in the case of an oil, gas, or other hydrocarbon lease or a geothermal resource and associated by-products lease, for as long thereafter as such product is produced in paying quantities or the lessee in good faith is conducting well drilling or construction operations, and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Idaho accepted this condition of admission to the Union by enacting Article 9., sec. 3 of the Idaho Constitution, supra. It has been held that such an agreement whereby an Admission Act makes a gift to the State of certain government lands and making the proceeds from the sale of such lands a permanent fund, the interest only of which is to be expended for support of common schools, and which gift is accepted by a reciprocal provision of the state constitution creating the state's school fund, amounts, to the creation of an express trust of which the state is trustee and guarantor of the trust estate against loss. **Duchesne County v. State Tax Commission**, 104 Utah 365, 140 P.2d 335 (1943).

The origin and status of the Fund is essentially identical to similar permanent school funds in neighboring sister states. See **State v. Board of Educational Lands and Funds**, 154 Neb. 244, 47 N.W.2d 520 (1951); **Schomer v. Scott**, 65 S.D. 353, 274 N.W.

556 (1937); **Alamo Drainage Dist. v. Bd. of County Commissioners**, 60 Wyo. 177, 148 P.2d 229 (1944). These permanent school funds have been consistently regarded by the courts as trust funds of the highest and most sacred order. See **State v. Peterson**, 61 Idaho 50, 97 P.2d 603 (1939) and cases cited therein. In this regard, Idaho Code 57-715 declares:

> "57-715. **Permanent endowment funds declared to be trust funds.**—Permanent endowment funds of the state of Idaho are hereby declared to be trust funds of the highest and most sacred order and shall be controlled, managed and invested by the board and the investment manager(s) or custodian(s) in accordance with the highest standard, and as hereinafter provided."

The case of **United States v. Fenton**, 27 F.Supp. 816 (D. Idaho 1939) dealt with the ramifications of the interrelationship between the Idaho Admission Act and Article 9, sec. 3 of the Idaho Constitution. There the Court observed:

> "The express purpose of the Admission Act and the State Constitution is to protect and hold inviolate and intact the fund from the Acts of the Legislature or acts or failures of the officers of the State." 27 F.Supp. at 818.

That Court further stated with respect to the general revenue fund vis-a-vis the permanent school fund:

> "There is a distinction between it and the common school fund, as the State holds the revenue as its own property and can enact such legislation applying to it as to statute of limitation as it sees fit, while as has been said the State holds the Public School fund in trust under the conditions of a National Act and the Constitution of the State and not as its property. The Supreme Court of Oklahoma explains clearly this distinction in the case of Board of Commissioners of Woods County v. State ex rel. Comm'rs, 125 Okl. 287, 257 P. 788, 779, 53 A.L.R. 1128, where it is said: 'There is a distinction between right accruing to the state in handling revenues belonging to it and the rights of the state arising from control of the common school fund, held in trust by the state. The revenues belonging to the

> state in its sovereign capacity are a part of its property, and so long as the state keeps within constitutional limitations it may deal with its property as it sees fit. On the other hand, the common school fund does not belong to the state, but the state merely holds such fund in trust under the conditions of the federal grant contained in the Enabling Act. The school and the state pledged itself to hold such trust inviolate for the benefit of the schools.' " 27 F.Supp. at 819. See also 78 C.J.S. **Schools and School Districts**, sec. 19.

The fundamental contention of plaintiff is that the mechanics of I.C. 57-724 which permits the offsetting of investment gains and losses by the Fund flies in the face of the rule establishing the inviolability of the Fund and denies the beneficiaries of the trust the full benefits intended by Congress and the draftsmen of the Idaho Constitution. It is argued that I.C. 57-724 impermissibly allows the diversion of interest (gains) from the Fund for a noneducational purpose, i.e., to offset losses suffered by the Fund.

The courts have the duty of carrying out as far as possible the provision of the constitution requiring that permanent school funds shall remain forever inviolate and undiminished. **Alamo Drainage Dist. v. Bd. of Educational Lands and Funds**, supra; 78 C.J.S. **Schools and School Districts**, sec. 19. The implementation of constitutional principles is an appropriate function of legislation and unless such implementing legislation is clearly in violation of the constitutional principle, it is a valid exercise of the legislature's power. **Idaho Gold Dredging v. Balderston**, supra; **Moon v. Investment Board**, 96 Idaho 140, 525 P.2d 335 (1974).

On a number of occasions the Supreme Court of the State of Idaho has found that an act of the state legislature had the effect of improperly diverting monies from the permanent school fund in violation of the Idaho Constitution. See **State v. Fitzpatrick**, 5 Idaho 499, 51 P. 112 (1897); **Roach v. Gooding**, 11 Idaho 244, 81 P. 642 (1905); **Teacher's Retirement System of Idaho v. Williams**; 84 Idaho 467, 374 P.2d 406 (1962).

The most and analogous Idaho decision in this subject area is the case of **Moon v. Investment Board**, 98 Idaho 871, 560 P.2d 871 (1977). In that case, the legislature had authorized that a portion of the earnings from the investments of the permanent school fund could be used to defray expenses incurred by the Fund's Investment Board in its activities related to investing the Fund's assets. The Supreme Court found this was an improper diversion of monies from the Fund becuase the purpose of the appropriation was clearly unrelated to the maintenance of the schools of the state.

This Court's research has uncovered a case from another jurisdiction that is virtually in point regarding the legitimacy of offsetting gains and losses from a permanent school fund. In the case of **State ex rel. Bottcher v. Bartling**, 149 Neb. 491, 31 N.W. 2d 422 (1948), the Nebraska legislature passed a law by which certain of the permanent school fund's gains, obtained from the sale of bonds at a price in excess of par value plus accrued interest, were permitted to be set aside from the funds as a separate capital reserve to offset past capital losses by the permanent school fund. The Supreme Court of Nebraska reasoned that:

> "By the provision complained of the Legislature sought to relieve the State from its constitutional obligation to supply all losses to the perpetual school funds. We have not been cited to any Legislature in any such manner to override and render for naught the will of the people as expressed through the Constitution. It is fundamental that in case of a conflict between the Constitution and legislative enactment the statute must give way to the Constitution. The Constitution is the paramount law. Where there is a conflict between an act of the Legislature and the Constitution of the State, the statute must yeild to the extent of the repugnancy. (Citations omitted.)
>
> To permit that which the Legislature has attempted to authorize by the provision complained of would be to permit the State to be relieved of its obligation to restore losses to the perpetual school funds by a mere bookkeeping

arrangement by the Board of Educational Lands and Funds over which funds the Legislature has no control and in which it and the State have no interest except in a supervisory capacity, and from which the State may not profit.

The State under the provisions of the Acts of Congress and the Nebraska Constitution herein referred to may not claim benefits to itself for profits flowing to trust funds of which it is trustee and thus relieve it of its constitutional obligation as a state to keep inviolate such trust funds.

The provision of the Act in question, if a valid exercise of legislative power, would permit the offset of losses occasioned by breach of trust against profits as well as losses not involving breach of trust. No different treatment is accorded the one than the other." 31 N.W.2d at 427-428.

The holding of the court in **State ex rel. Bottcher v. Bartling**, supra, is cited as authority by the authors of 78 C.J.S. **Schools and School Districts**, Sec. 19 at page 636 for the proposition that:

"***So, where bonds belonging to the perpetual school funds are sold at a price in excess of the par value with accrued interest, the difference between par value with accrued interest and the sale price constitutes capital gain rather than income which may be distributed, **and a statute providing that such gain may be set up as a capital reserve to offset past capital losses is invalid as impairing the trust fund.**" (Emphasis supplied.)

The Court is persuaded that the holdings in **Moon v. Investment Board**, 98 Idaho 200, 560 P.2d 871 (1977) and **State ex rel. Bottcher v. Bartling**, supra, are dipositive of the pivotal issues in this case. The practical result of the procedures set forth in I.C. 57-724 is to allow the State of Idaho to "claim benefits to itself for profits flowing to trust funds of which it is trustee and thus relieve it of its constitutional obligation as a state to keep inviolate such trust funds." **State ex rel. Bottcher v. Bartling**, supra. The "mere bookkeeping arrangement" devised by I.C. 57-724 enables the state to effectively divert monies from the Fund for the purpose of minimizing or negating altogether

the state's obligation to "supply all losses" as required by the Constitution. This legislatively authorized use of the Fund's assets is clearly not in furtherance of any educational purpose and is therefore incompatible with the terms of the trust agreement with the United States and contrary to the will of the people of Idaho as expressed in their Constitution. I.C. Sec. 57-724 is therefore unconstitutional.

This Court's holding however leaves the plaintiff's prayer for affirmative relief partially in a legal vacuum. The situation in Idaho is that the constitutional provisions for the preservation of the permanent school fund are not self-executing, i.e., they require complementary legislation in order to effectively carry out the intent of the constitution. **Moon v. Investment Board**, 96 Idaho 140, 525 P.2d 335 (1974). **Accord, State v. State School Fund Comm'n**, 152 Kan. 427, 103 P.2d 801 (1940). Having found that I.C. 57-724 is invalid and there being no other statute carrying out the intent of the Idaho Constitution Art. 9, sec. 3, this Court is without power to compel performance of the state's obligation, if any, to replace shortages in the Fund. 78 C.J.S. **Schools and School Districts**, Sec. 19, pg. 636.

Appropo is the observation of the Nebraska court in addressing a case similar to the instant matter. There the court said:

> "There is another and perhaps even more cogent reason why this action may not be maintained. Section 9, art. VII of the Constitution, supra, provides that the state shall supply all losses which shall in any manner accrue to the school funds. The Constitution, however, does not prescribe means or a method of carrying into effect this imposed obligation; hence, this provision is not self-executing.
>
> A comprehensive definition of constitutional provisions which are not self-executing is the following from 16 C.J.S., Constitutional Law, p. 98, Sec. 48; 'Constitutional provisions are not self-executing if they merely indicate a line of policy or principles, without supplying the means by which such policy or principles are to be carried into effect, or if the language used and the circumstances of its adoption that subsequent legislation was contemplated to

carry it into effect.'

It is clear that legislation is necessary to carry into effect a restoration of the losses in the permanent school fund. No existing law is found providing a means or method of raising necessary revenue to replace losses in the fund in case any are discovered, and neither is there any law requiring a ministerial ascertainment of information relative to losses and the furnishing of such information to the legislature or to some other department of government.

In the vein and somewhat in paraphrase of some of the language used in the opinion in State of Alabama v. Schmidt, 232 U.S. 168, 34 S.Ct. 301, 58 L.Ed. 555, the state of Nebraska received and accepted these public school lands as a gift, and by the adoption of the constitutional provisions relating thereto considered this a solemn and sacred obligation imposed on its public faith. The obligation is an honorary one which the courts are powerless to enforce. To perform its sacred obligation, to redeem its pledge, if the allegations of fact contained in the petition of the plaintiff with reference to shortages in the permanent school fund are true, it is the duty of the legislature, long neglected, to make provision for and to ascertain the shortages in the fund, and further by appropriate legislation to take the steps necessary to raise revenue to restore the fund to its proper condition."

State v. Bd. of Commr's for Educational Lands and Funds, 141 Neb. 172, 3 N.W.2d 196, at 200 (1942).

Therefore, in respect to the relief sought by the plaintiff herein, the Court concludes that a partial judgment should be entered in favor of the plaintiff based upon the foregoing decision, ordering that the defendant Board of Examiners allow the claim of the plaintiff to the legislature, but that the Court is without power to order the legislature to appropriate funds to replenish the shortages in the permanent school fund.

The foregoing shall constitute Findings of Fact and Conclusions of Law of the Court. I.R.C.P. 52 (a).

Counsel for the plaintiff may prepare an appropriate form

of Judgment and Order reflecting the Court's decision, for entry by the Court.

IT IS SO ORDERED

Dated this 23rd day of January, 1981

Jesse R. Walters
District Judge

APPENDIX C

IDAHO SUPREME COURT/COURT OF APPEALS

THE STATE OF IDAHO, ON RELATION OF MARJORIE RUTH MOON, STATE TREASURER OF THE STATE OF IDAHO,
Plaintiff-Respondent, Cross-Appellant,
v.
STATE BOARD OF EXAMINERS, et al.,
Defendants-Appellants, Cross-Respondents.

ORDER
No 14070

COUNSEL:

The Court has ORDERED that RESPONDENT'S PETITION FOR REHEARING of the opinion of this Court issued March 24, 1983 be, and the same hereby is, DENIED.
DATED this 10th day of May, 1983.

By Order of the Supreme Court

Frederick C. Lyon, Clerk
Supreme Court/Court of Appeals
State of Idaho

APPENDIX D

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, on relation of MARJORIE RUTH MOON, State Treasurer of the State of Idaho, *Plaintiff,* —vs— STATE BOARD OF EXAMINERS, and the Legislature of the State of Idaho, by and through RALPH OLMSTEAD, Speaker of the House, and REED W. BUDGE, President Pro-Tem of the Senate, *Defendants.*	CASE NO. 66087 SUPPLEMENTAL COMPLAINT

State of Idaho, on Relation of Marjorie Ruth Moon, State Treasurer, alleges as follows:

I

This action arises under the Idaho Admission Act, 26 Stat. L.215, (1890) and the United States Constitution as hereinafter more fully appears. The District Court of the State of Idaho has jurisdiction over this action pursuant to Article 5, Section 20, of the Constitution of the State of Idaho.

II

Plaintiff is duly elected, qualified and acting State Treasurer of the State of Idaho, and, as State Treasurer, is designated by Article IX, Section 3, of the Constitution of the State of Idaho

as custodian of the Public School Endowment Fund. Plaintiff brings this action for the State of Idaho and for the benefit of the school children of the State of Idaho who are the beneficiaries of the Public School Endowment Fund.

III

The Public School Endowment Fund was originated in 1863 by the Organic Act of the Territory of Idaho, 12 Stat. 808 (1863), and was established for the State of Idaho in 1890 in the Idaho Admission Act, 26, Stat. 215 (1890).

IV

The Public School Endowment Fund constitutes a trust fund of the highest and most sacred order, made so by Act of Congress and the Idaho Constitution, and was so considered by the members of the Idaho Constitutional Convention.

V

Article IX, Section 3 of the Idaho Constitution provides the state shall supply all losses of the Public School Endowment Fund that may in any manner occur.

VI

The Board of Examiners of the State of Idaho is established by Article 4, Section 18, Constitution of the State of Idaho, and has the power to examine all claims against the State of Idaho, except salaries or compensation of officers fixed by law.

VII

The Legislature of the State of Idaho is established by Article III, Section 1, of the Constitution of the State of Idaho, and it has the power to appropriate public funds of the State of Idaho including any public funds necessary to make up losses sustained by the Public School Endowment Fund.

VIII

The Public School Endowment Fund has incurred and realized

losses in its principal as follows:

(1) For debentures issued between 1931 and 1937 for all amounts due for losses occurring since statehood, as reported on 30 September, 1938, in the sum of $725,727.80;

(2) For losses, shown in 1968 Legislative Auditor's Report in the sum of $104,707.34;

(3) For losses reported for the period from 25 March, 1969, through 30 June, 1979, in the sum of $6,168,950.46.

The total of the principal losses to the Public School Endowment Fund is calculated to be the sum of $7,009,358.60.

The Public School Endowment Fund has incurred losses with respect to interest that could have been earned on the principal. The interest losses are computed at the rate of Eight per cent (8%) per annum on the principal losses listed above as follows:

(1) Interest on reported 1938 losses is calculated to be the sum of $2,413,187.02;

(2) Interest on reported 1968 losses is calculated to be the sum of $92,142.49;

(3) Interest on reported 1969 to 1979 losses is calculated to be the sum of $3,926,264.21.

The total of the interest losses to the Public School Endowment Fund is calculated to be the sum of $6,431,593.71.

IX

On December 5, 1975, Marjorie Ruth Moon, in her capacity as custodian of the Public School Endowment Fund, presented to the Board of Examiners a claim for part of said losses; a copy of said claim is attached as Exhibit "A"; that said claim was denied by the Board of Examiners as is shown by the excerpt of minutes attached hereto as Exhibit "B"; that plaintiff has presented a new claim covering all losses to the Board of Examiners and plaintiff expects such new claim to be denied; that a copy of such new claim is attached as Exhibit "C."

X

By virtue of the Idaho Admission Act, and the Constitution of the State of Idaho, the Board of Examiners has a legal duty

to allow the claim for said losses to the Public School Endowment Fund, and the Legislature of the State of Idaho has a legal duty to appropriate public funds to supply and make up said losses. The Constitution of the State of Idaho, including the provision in Article IX, Section 3, was a part of the State Constitution when Congress in 1890 accepted, ratified and confirmed the State Constitution, as provided in Section 1, Idaho Admission Bill. The grant of federal lands as provided in Section 4 and 5 of the Idaho Admission Act was made upon certain conditions, including the following:

> "the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools."

The provisions of the Constitution of the State of Idaho, and the provisions of the Idaho Admission Act constitute a contract between the United States and the State of Idaho, to create a trust fund called the Public School Endowment Fund for the benefit of the school children of Idaho. The trust fund so created is not the property of the State of Idaho, and is held in trust under the conditions of the federal grant contained in the contract between the United States and the State of Idaho.

In order to reflect the essential purposes of the grants of federal land made in the Idaho Admission Act, this Court must interpret Idaho's Constitution and statutes to provide full benefits by making up all losses to the Public School Endowment Fund. A failure to provide such benefits violates the Idaho Admission Act and the United States Constitution.

XI

The Board of Examiners has the ability to comply with its legal duty by allowing said claim, and the Board could comply with its duty without impairing the rights of any person not a party to this proceeding.

XII

The Legislature of the State of Idaho has the ability to comply with its legal duty by appropriating public funds to supply and

make up said losses; the Legislature has failed to enact legislation to appropriate public funds to supply and make up said losses even though it has had adequate opportunities to do so; the Legislature could comply with its duty without impairing the rights of any person not a party to this proceeding.

XIII

The failure of the Board of Examiners to allow said claim and the Legislature of the State of Idaho to supply said losses constitutes a breach of said contract, and constitutes a violation of the Idaho Admission Act and the United States Constitution. The express purpose of the Idaho Admission Act and the Constitution of the State of Idaho is to protect and hold inviolate and intact the Public School Endowment Fund from the acts of the Legislature or the acts or failures of the officers of the State of Idaho.

XIV

The State of Idaho has waived its immunity to be sued by entering into and assuming contractual obligations arising from the provisions of the Constitution of the State of Idaho and the Idaho Admission Act.

XV

Since the memorandum decision and order entered in this case on July 24, 1979, plaintiff has submitted to the 1980 Legislature of the State of Idaho a proposed bill for an appropriation to replace the principal and interest losses set forth in Paragraph VIII; a copy of the proposed bill is attached hereto as Exhibit "D"; the 1980 Session of the Legislature of the State of Idaho has failed to enact the proposed bill or to enact any legislation to make up any of the aforesaid principal losses or any of the aforesaid interest losses.

XVI

The losses for the State of Idaho fiscal years ending June 30, in 1970, 1971 and 1972 are not yet known; that an audit of the

records of the Public School Endowment Fund by the legislative auditor should be undertaken to identify the precise dollar amount of losses for those three fiscal years; plaintiff's own search of the records indicates there were losses totaling $283,338.89 during fiscal years 1970 and 1972.

WHEREFORE, Plaintiff prays for judgment as follows:

1. To order the State Board of Examiners to allow said claim for the losses to the Public School Endowment Fund, and

2. To set a reasonable time for the Legislature of the State of Idaho to require an audit for fiscal years 1970, 1971 and 1972 of the Public School Endowment Fund, to enact legislation to appropriate public funds to pay the losses, and in the event the Legislature fails to act, then to enter a judgment directing payment of the losses from public funds over a period of time as determined by the Court, and

3. For such further relief, as may be required to have all losses to the Public School Endowment Fund made up.

DATED this 7th day of May, 1980.

Wayne P. Fuller
Special Assistant Attorney General
State of Idaho
Post Office Box 130
Caldwell, ID 83605

EXHIBIT A

To: The Board of Examiners of the State of Idaho
State House
Boise, Idaho

The undersigned, in her capacity as State Treasurer and as Custodian of the Public School Endowment Fund, does hereby present to the Board of Examiners of the State of Idaho the following claim:

1. That the sum of $1,319,382 be approved for payment and/or paid to the Public School Endowment Fund to make up losses incurred and realized (and realized) on sale of U.S. Government Bonds during the period from March 25, 1969 to June 30, 1970 by the Investment Board of the State of Idaho.

2. That the sum of $2,651 be approved for payment and/or paid to the Public School Endowment Fund to make up losses incurred and realized on sale of the U.S. Government Bonds during the period from July 1, 1971, to June 30, 1972 by the Investment Board of the State of Idaho.

3. That the sum of $26,477 be approved for payment and/or paid to the Public School Endowment Fund to make up losses incurred and realized on sale of U.S. Government Bonds during the period from July 1, 1972 to June 30, 1973.

/s/ Marjorie Ruth Moon
Custodian of State Endowment Fund

EXHIBIT B

MINUTES OF THE MEETING OF THE STATE BOARD OF EXAMINERS Held in the office of the Governor, December 5, 1975. Members present were: Governor Cecil D. Andrus, Chairman of the Board, Secretary of State Pete T. Cenarrusa and Attorney General Wayne L. Kidwell. Also present were: Marjorie Ruth Moon, State Treasurer and her Attorney Wayne P. Fuller. Called into the meeting was Mr. William G. Hepp, Investment Manager of the Endowment Fund Investment Board. News media also present.

IN RE - CLAIM TO THE STATE BOARD OF EXAMINERS BY WAYNE P. FULLER ON BEHALF OF MARJORIE RUTH MOON, STATE TREASURER

CLAIM

To: The Board of Examiners of the State of Idaho
State House
Boise, Idaho

The undersigned, in her capacity as State Treasurer and as Custodian of the Public School Endowment Fund, does hereby present to the Board of Examiners of the State of Idaho the following claim:

1. That the sum of $1,319,382 be approved for payment and/or paid to the Public School Endowment Fund to make up losses incurred and realized (and realized) on sale of U.S. Government Bonds during the period from March 25, 1969 to June 30, 1970 by the Investment Board of the State of Idaho.

2. That the sum of $2,651 be approved for payment and/or paid to the Public School Endowment Fund to make up losses incurred and realized on sale of the U.S. Government Bonds during the period from July 1, 1971, to June 30, 1972 by the

Investment Board of the State of Idaho.

3. That the sum of $26,477 be approved for payment and/or paid to the Public School Endowment Fund to make up losses incurred and realized on sale of U.S. Government Bonds during the period from July 1, 1972 to June 30, 1973.

/s/ Marjorie Ruth Moon
Custodian of State Endowment Fund

Attorney General Wayne Kidwell requested permission to abstain from voting on the issue. Mr. Kidwell acting as Chairman of the Board, Governor Cecil D. Andrus made the motion, seconded by the Secretary of State Pete T. Cenarrusa to deny this claim.

EXHIBIT C

To: The Board of Examiners of the State of Idaho
State House
Boise, Idaho

The undersigned, in her capacity as State Treasurer and as Custodian of the Public School Endowment Fund, does hereby present to the Board of Examiners of the State of Idaho the following claim:

1. The sum of $735,727.80 be approved for payment and/or paid to the Public School Endowment Fund to make up principal losses reported 30 September 1938.

2. The sum of $104,707.34 be approved for principal losses to the Public School Funds reported in 1968.

3. The sum of $6,168,950.46 be approved for principal losses to the Public School Endowment Fund reported for the period from 25 March 1969 to 30 June 1979.

4. The sum of $2,413,187.02 be approved to replace interest losses to the Public School Endowment Fund for the 1938 reported principal losses.

5. The sum of $92,142.69 be approved to replace interest losses to the Public School Endowment Fund for the 1968 reported principal losses.

6. The sum of $3,926,142.69 be approved to replace interest losses to the Public School Endowment Fund on the 1969 to 1979 principal losses.

The undersigned reserves the right to submit an additional claim for the fiscal years 1970, 1971 and 1972, since the losses for such years are unknown at this time.

DATED: May, 1980

/s/Marjorie Ruth Moon, Custodian of the
Public School Endowment Fund

EXPENDITURE VOUCHER

STATE OF IDAHO

Office of State Auditor

Acct. No.

Auditor's Issue

State Treasurer as Custodian of Public School Endowment Funds

PAY Public School Endowment Fund

TO

CHECK ONE:

( ) MISCELLANEOUS EXPENDITURE

( ) STATE CONTRACT

(a) Contract arising from Idaho Admission Act

( ) PURCHASE ORDER

( ) MISCELLANEOUS ENCUMBRANCE REQUISITION

PAYMENT ( ) PARTIAL ( ) FINAL

Line No	PROGRAM Mo	Man	Yr	ACCT	CLASS Major	Minor	DESCRIPTION (Include Quantity)	COMPLETE ONE %	LINE AMOUNT	AGENCY USE
				1101			Fee Attached		735,727.80	
				1103			Fee Attached		104,707.34	
				1101			Fee Attached		6,168,950.46	
								TOTAL 100%	7,009,385.60	

NOTE: Final payments must be accompanied by a receiving copy

TO STATE AUDITOR

AUDITOR'S CERTIFICATE

SUPPLEMENTAL COMPLAINT -46-

EXPENDITURE VOUCHER

STATE OF IDAHO

Office of State Auditor

3-7-80

State Treasurer or Custodian of Public School Endowment Funds

Public School Income Fund

CHECK ONE:

( ) MISCELLANEOUS EXPENDITURE

( ) STATE CONTRACT

(a) Contract exempt from Idaho Admission Act

( ) PURCHASE ORDER

( ) MISCELLANEOUS ENCUMBRANCE REDUCTION

( ) PARTIAL ( ) FINAL

LINE No.	PROGRAM	ACCT	CLASS	DESCRIPTION (Include Quantity)	COMPLETE ONE %	UNIT AMT/AMT	AGENCY USE
		1101		See Attached		2,413,187 02	
		1101		See Attached		92,142 69	
		1101		See Attached		3,928,142 69	
					TOTAL 100%	6,433,472 40	

3-7-80

SUPPLEMENTAL COMPLAINT -47

EXHIBIT D

IN THE _____

_____ BILL NO. _____

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO LOSSES TO THE PUBLIC SCHOOL FUND; AMENDING SECTION 57-724, IDAHO CODE, TO PROVIDE THAT GAINS AND LOSSES SHALL BE CALCULATED ON AN ANNUAL BASIS, TO PROVIDE THAT LOSSES SHALL BE MADE UP BY AN APPROPRIATION FROM THE GENERAL ACCOUNT, TO PROVIDE FOR THE PAYMENT OF INTEREST ON LOSSES, AND TO PROVIDE NOMENCLATURE CHANGES; APPROPRIATING MONEYS FROM THE GENERAL ACCOUNT TO THE PUBLIC SCHOOL FUND TO REPLACE LOSSES; APPROPRIATING MONEYS FROM THE GENERAL ACCOUNT TO THE PUBLIC SCHOOL INCOME FUND TO REPLACE INTEREST LOSSES; AND REQUESTING THAT THE LEGISLATIVE AUDITOR DETERMINE LOSSES TO THE PUBLIC SCHOOL FUND BY CONDUCTING AN EXAMINATION OF CERTAIN BOOKS AND RECORDS OF THE ENDOWMENT BOARD.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Sections 57-724, Idaho Code, be, and the same is hereby amended to read as follows:

57-724. DISTRIBUTION OF INCOME FROM INVESTMENTS — DETERMINATION OF ~~NET~~ CAPITAL GAINS OR LOSSES. The board shall distribute the income from the investments or securities in accordance with this act. For the purposes of this act, income shall not include capital gains derived from the sale of investments or securities. In computing ~~net~~ capital gains or net capital losses the board shall

use the marketable value of the securities as of the effective date hereof for its computation on July 1, 1971, and shall thereafter use the difference between acquisition cost of securities and actual proceeds received from the sale of securities as the determinant of the gain or loss. Gains or losses shall be determined ~~for four (4) years~~ annually, commencing on July 1, ~~1975~~ 1979. At the end of each ~~such four (4) year~~ annual period, ~~the net amount~~ of all losses, plus interest at the rate of eight percent (8%), ~~on the sale of securities not offset by gains on the sale of securities during such period~~ shall be computed and such ~~net~~ losses shall be made up from an appropriation from the general ~~fund~~ account, and shall be credited to the appropriate fund or account. All net income ~~or net losses~~ from the investments or securities shall be distributed to each participating fund or account in the same rates as each fund's or account's average daily balance bears to the total average daily balance of all participating funds and accounts, provided, losses of the public school fund shall be maintained separate from all other funds as required by section 3 or article 9 of the Idaho Constitution.

SECTION 2. There is hereby appropriated from the General Account to the Public School Fund the following amounts to replace losses to the Public School Fund:

(1) For losses reported 30 September 1938	$ 735,727.80
(2) For losses reported in 1968	104,707.34
(3) For losses reported for the period 25 March 1969 through 30 June 1979	6,168,950.46
TOTAL	$7,009,385.60

SECTION 3. There is hereby appropriated from the General Account to the Public School Income Fund the following amounts to replace interest losses to the Public School Income Fund:

(1) Interest on 1938 losses	$2,413,187.02
(2) Interest on 1968 losses	92,142.49
(3) Interest on 1969 to 1979 losses	3,926,264.21
TOTAL	$6,431,593.72

SECTION 4. Because the accounting records of the Endowment Board for fiscal years 1970, 1971, and 1972 have not been completely searched to identify the total losses that may have occurred in the Public School Fund, the Joint Senate Finance-House Appropriations Committee is requested to order the Legislative Auditor to conduct an examination of the books and records of the Endowment Board for fiscal years 1970, 1971, and 1972 to identify the precise dollar amount of losses to the Public School Fund.

APPENDIX E

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Article 4, Section 3:

"New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states; or parts of states, without the consent of the legislatures of the states concerned as well as of the congress.

The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular states."

Article 6:

"All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Idaho Constitution:

Article 9, Section 3:

"The public school fund of the state shall forever remain inviolate and intact; the interest thereon only shall be expended in the maintenance of the schools of the state, and shall be distributed among the several counties and school districts of the state in such manner as may be prescribed by law. No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided."

§4. The public school fund of the state shall consist of the proceeds of such lands as have heretofore been granted, or may hereafter be granted, to the state by the general government, known as school lands, and those granted in lieu of such; lands acquired by gift or grant from any person or corporation under any law or grant of the general government; and of all other grants of land or money made to the state from the general government for general educational purposes, or where no other special purpose is indicated in such grant; all estates or distributive shares of estates that may escheat to the state; all unclaimed shares and dividends of any corporation incorporated under the laws of the state; and all other grants, gifts, devises, or bequests made to the state for general education purposes."

Idaho Admission Act:

"§1. The state of Idaho is hereby declared to be a state of the United States of America, and is hereby declared admitted into the union on an equal footing with the original states in all respects whatever; and that the constitution which the people of Idaho have formed for themselves be,

and the same is hereby, accepted, ratified and confirmed."

"§4. School lands.—Sections numbered 16 and 36 in everytownship of said state, and where such sections or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said state for the support of common schools, such indemnity lands to be selected within said state in such manner as the legislature may provide, with the approval of the secretary of the interior."

"§5. Sale or lease of school lands.—(a) Except as provided in subsection (b) all lands herein granted by educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. Such lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than ten years, and in the case of an oil, gas, or other hydrocarbon lease or a geothermal resource and associated by-products lease, for as long thereafter as such product is produced in paying quantities or the lessee in good faith is conducting well drilling or construction operations, and such lands shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

(b) Such lands may be exchanged for other lands, public or private. The values of such lands so exchanged shall be approximately equal or, if they are not approximately equal, they shall be

equalized by the payment of money by the appropriate party. If any such lands are exchanged with the United States, such exchange shall be limited to Federal lands within the State that are subject to exchange under the laws governing the administration of such lands. All such exchanges hereto fore made with the United States are hereby approved."

"§7. Public lands—Sale—Per cent paid state for school fund.—Five per cent of the proceeds of the sales of public lands lying within said state which shall be sold by the United States subsequent to the admission of said state into the union, after deducting all the expenses incident to the same, shall be paid to the said state, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said state."

Organic Act:

§14. School lands.—When the lands in the territory shall be surveyed, under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same."

STATE STATUTES

"57-724. Distribution of Income From Investments - Determination of Net Capital Gains or Losses. The board shall distribute the income from the investments or securities in accordance with this act. For the purposes of this act, income shall not include capital gains derived from the sale of investments or securities. In computing net capital gains or net capital losses the board shall use the marketable value of the securities as of the effective date hereof (March 25, 1969) for its computation on July 1, 1971, and shall thereafter use the difference between acquisition cost of securities and actual proceeds received from the sale of securities as the determinant of the gain or loss. Gains or losses shall be determined for four (4) year periods, commencing on July 1, 1975. At the end of each such four (4) year period, the net amount of losses on the sale of securities, not offset by gains on the sale of securities during such period shall be computed and such net losses shall be made up from an appropriation from the general fund, and shall be credited to the appropriate fund. All net income or net losses from the investments or securities shall be distributed to each participating fund in the same rates as each fund's average daily balance bears to the total average daily balance of all participating funds, provided, losses of the public school fund shall be maintained separate from all other funds as required by section 3 of article 9 of the Idaho Constitution."

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Petitioner,

vs.

STATE BOARD OF EXAMINERS, and the Legislature of the State of Idaho, by and through THOMAS W. STIVERS, Speaker of the House, and JAMES E. RISCH, President Pro-Tem of the Senate,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

JIM JONES
Attorney General

LARRY K. HARVEY
Chief Deputy Attorney General

LYNN E. THOMAS
Solicitor General
Counsel of Record
State of Idaho
Statehouse, Boise, ID 83720
(208) 334-2400

Attorneys for Respondents

October 21, 1983

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

STATEMENT OF THE CASE

Petitioner, who is the State Treasurer of Idaho, seeks review of a decision of the Idaho Supreme Court in which that court held that the Idaho Constitution was not violated by a state statute relating to the Public School Endowment Fund—a trust for the benefit of schools resulting from the Idaho Admission Act—which permitted capital gains arising from investments of the proceeds of federally donated lands to be offset against capital losses at the end of a four-year accounting period.

Petitioner had argued in the state supreme court that the legislature was required to make good any losses to

the Public School Endowment Fund without considering offsetting capital gains. *State ex rel. Moon v. State Bd. of Examiners, et al.*, 104 Idaho —, 662 P. 2d 221 (1983).

Respondents agree with the procedural history of the case set forth in petitioner's statement.

SUMMARY OF ARGUMENT

1. The question whether federal law requires that petitioner's method of accounting for the Public School Endowment Fund, a fund resulting from the sale, lease or exchange of federally donated lands, was not decided by the Idaho state courts. The state courts decided only questions of state constitutional and statutory law. Accordingly, no federal question is properly before this Court.

2. Petitioner's theory of losses to the Public School Endowment Fund of the State of Idaho does not raise a significant federal question. The Idaho Admission Act, an act of Congress, specifies only that the trust property resulting from sales, leases or exchanges of federally donated lands be preserved for the beneficiaries of the trust. No principle of federal law prevents investment of the endowment funds or calculating investment "losses" to be only those not offset by capital gains from investments.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I.

No Federal Question Was Decided By the Idaho Supreme Court

Petitioner's "Supplemental Complaint" (Petition for Certiorari, Appendix D) in the Idaho trial court alleged that the action arose under the Idaho Admission Act, the United States Constitution, and provisions of the Idaho Constitution. No specific mention of any assertedly governing federal constitutional provision was made. Instead, petitioner alleged in substance that the Public School Endowment Fund was created as a trust fund by the acts of Congress creating the Territory of Idaho, and, later, admitting the Territory to the Union as a state. She also alleged that the Idaho Constitution provided for the Public School Endowment Fund and required the legislature to protect the fund against loss. The essential feature of her complaint was the theory that (1) the trust fund was the result of a contract between the state and he United States because the fund resulted from a provision of the Idaho Admission Act, (2) it was a violation of the terms of this "contract" to balance overall gains to the fund against overall losses instead of viewing individual transaction losses as unaffected by offsetting gains to the fund resulting from investment decisions made by the trustees, and (3) the alleged method of accounting for "losses" to the Endowment Fund would violate the Admission Act and the United States Constitution unless the state Constitution and statutes were interpreted to require the leg-

islature to make up "losses" according to petitioner's method of calculating them.

Petitioner also asserted in her supplemental complaint that provisions of the Idaho Constitution required the legislature to make good all losses to the Public School Endowment Fund. She claimed that under the relevant Idaho constitutional provisions the Board of Examiners of the state had an obligation to allow her claim for losses to the fund as such might be calculated without reference to any offsetting capital gains.

The trial court granted summary judgment for petitioner on the theory that the Idaho constitutional requirement to keep the Public School Fund "inviolate and intact," IDAHO CONST. art. IX, § 3, was violated by the state statute authorizing investment losses to be offset by investment gains (Idaho Code § 57-724). (Petition, Appendix B, p. 30a). The district court ordered the Board of Examiners to present petitioner's claim to the state legislature, but held that it had no power to order the legislature to appropriate funds. (Petition, Appendix B, p. 31a).

The trial court viewed the issues presented in the summary judgment proceeding as "founded upon Idaho Constitution Art. 9, Sec. 3" (Petition, Appendix B, p. 21a), and did not purport to interpret federal legislative enactments or constitutional provisions.

Respondents, the Idaho State Board of Examiners and the state legislature, appealed the trial court's decision to the Idaho Supreme Court. The state Supreme Court restricted itself to consideration of the theory of state constitutional and statutory law announced by the

trial judge. Under Idaho law, an appeals court will consider only those questions decided in the trial court. *Oregon Shortline RR. Co. v. City of Chubbuck,* 93 Idaho 815, 474 P. 2d 244 (1970); *Bogert v. Kinzer,* 93 Idaho 515, 465 P. 2d 639 (1970), *appeal dismissed* 403 U. S. 914.

The state supreme court reversed the decision of the trial court. It held that the method of computing losses authorized by the state statute was not a violation of the state constitutional provision.

> The result contended for by the treasurer would have us interpret the terms "capital gains" and "interest" as being synonymous. Noting that the Constitution provides the "*interest* thereon only shall be expended in the maintenance of the schools . . . ," she argues that to offset capital gains and capital losses would be to in effect spend the gains other than for school purposes. However, the constitution does not specify how losses shall be computed. It does not define capital gains and interest as being synonymous terms and we decline to do so. 104 Idaho at —, 662 P. 2d at 223; Petition, Appendix A, p. 6a.

The Idaho Supreme Court did not interpret or apply any federal statutory or constitutional provision. Two questions are comprised by petitioner's theory: (1) Does the state Constitution and the state's statutory scheme require the adoption of petitioner's method of computing losses to the state's Public School Endowment Fund? and (2) If state law does not require adoption of the petitioner's theory, does federal law impose such a requirement? The latter question requires an interpretation of the Idaho Admission Act, 26 Stat. 215, Ch. 656 (1890), which provides in Section 5(a) that the proceeds from the sale or lease of school lands will be assigned to the permanent

school fund, and only the interest will be expended in the support of the public schools. *Id.* Only the first of these questions was considered by the state courts.

Thus, petitioner now asks this Court to decide a question not decided by the Idaho Supreme Court, that is, whether *federal* law requires a different method of computing "losses" to the Public School Endowment Fund than that authorized by the Idaho legislature and upheld by the Idaho Supreme Court. For that reason, the petition for certiorari should be denied. This Court has held that it will not consider a federal question in cases where the highest court of a state has not decided the federal question, or the federal question was not presented in such a manner that it was necessarily decided by the action of the state court. *Street v. New York,* 394 U. S. 576 (1969). Moreover, where a state court has failed to pass upon a federal question, it will be assumed the omission was due to the want of proper presentation in the state courts unless the aggrieved party can affirmatively show the contrary. *Id.*

See also, Bailey v. Anderson, 326 U. S. 203 (1945); *Chicago, I, & L.R. Co. v. McGuire,* 196 U. S. 128 (1905).

A litigant's failure to present a federal question in conformance with state procedure, for which failure a state court declines to consider the federal question, constitutes an adequate state ground barring review in the United States Supreme Court. *Michigan v. Tyler,* 436 U. S. 499 (1978).

II.

The Underlying Federal Question Is Not Of Such Significance To Justify Granting The Petition For Certiorari.

Apart from the circumstance that the underlying federal question was not decided by the state courts, the petitioner's theory of losses to the Public School Endowment Fund does not raise a significant federal question.

Federally donated lands, such as those defined by the Idaho Admission Act, were intended to create a trust *res* consisting of the lands and the proceeds from the sale and use of the lands. *Lassen v. Arizona*, 385 U. S. 458 (1967); *Alamo Land & Cattle Co. v. Arizona*, 424 U. S. 295 (1976). Congress intended that the earnings of the trust *res* be available for the support of the public schools, *Id.*, and, for that reason, the United States maintains a continuing interest in the administration of the trust property. *Id.*

The language of the Idaho Admission Act contemplates only that donated lands and proceeds from the sale or lease of donated lands will become part of the body of the trust. Section 4 provides that the specified lands were "granted" to the state "for the support of common schools." 26 Stat. 215, Ch. 656 (1890). Section 5 authorizes the sale or lease of the donated lands with the proceeds to go to the permanent school fund. 26 Stat. 216, Ch. 656 (1890). The state Constitution provided that the fund thus created should remain "intact" and the interest derived from it expended on the public schools. IDAHO CONST. art. IX, § 3. In short, the plain language of the relevant statutory and constitutional provisions refers only to the original proceeds from any sale or lease of

donated lands. Interest "gains" were not part of the *res*, and thus not subject to being left intact, because it was clearly contemplated by Congress that interest would be spent on the public schools. 26 Stat. 216, Ch. 656 (1890).

The cases decided by this Court are consistent with this view of the trust property. The trust is to receive *appropriate* compensation for the sale of donated lands, *Lassen v. Arizona, supra,* but it is clear that sales and leases were intended in order that a fund of money could be accumulated to earn income for the benefit of the school fund. *Alamo Land & Cattle Co. v. Arizona, supra; Ervien v. United States,* 251 U. S. 41 (1919).

None of this creates any inference that the method of maintaining the fund "inviolate" was to be controlled by federal law. As long as the trust *res* is not diminished, the plain terms of the Admission Act and the state Constitution are not violated and the beneficiaries of the trust are not deprived of any part of the principal of the trust. Inasmuch as the principal concern of Congress was that the beneficiaries of the trust receive "full benefit" from any sale, lease or exchange of donated lands, *Alamo Land & Cattle Co. v. Arizona, supra,* it seems plain that no principle of federal law is implicated by the state's procedure of replenishing the fund only with respect to investment losses not offset by investment gains.

Indeed, petitioner's theory would not insure that the beneficiaries of the fund receive full benefit from it. As the Idaho Supreme Court pointed out, petitioner's approach would so restrict investment decisions respecting the fund that the best possible return might not be realized:

> To require the legislature to make up losses incurred on each security sale might well act to the detriment of the school children of Idaho. It would unduly restrict the Endowment Fund Investment Board.
>
> For example, the Fund frequently holds bonds, which if held to maturity would yield a certain profit, but which if sold before maturity at a loss, and with the proceeds elsewhere reinvested, would yield a higher long range profit. This flexibility and opportunity for higher profit would likely not be exercised if the legislature would be forced to make up the loss of the sale of the bonds. 104 Idaho at —, 662 P. 2d at 223; Petition, Appendix A, p. 6a.

The Idaho Supreme Court was unwilling to apply such a restrictive meaning to the relevant statutory and constitutional provisions. Moreover, respondents have found nothing in the federal law that leads to the conclusion that *preserving* the value of trust property conferred upon the state by the United States requires the court to ignore the effect on the trust property of investment gains while at the same time considering investment losses to decrease the trust *res*, thus requiring the legislature to make good the losses.

CONCLUSION

This Court should not grant the petition for a writ of certiorari. The federal question which petitioner seeks to raise by this proceeding was not decided in the state courts.

Moreover, questions respecting the method of accounting for the trust property do not raise an important

federal question where, as here, there is no question of reduction of the trust property.

DATED this 21 day of October, 1983.

Respectfully submitted,

/s/ LYNN E. THOMAS
Solicitor General
State of Idaho
Statehouse, Boise, ID 83720
(208) 334-2400

Attorney for Respondents

No. 83-186

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REPLY BRIEF FOR PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

WAYNE P. FULLER
Special Assistant Attorney General
State of Idaho
Post Office Box 130
Caldwell, Idaho 83605
(208) 459-1681
Attorney for Petitioner

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Respondents.

REPLY BRIEF FOR PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

STATEMENT OF CASE

Marjorie Ruth Moon, State Treasurer of the State of Idaho, (hereinafter called Petitioner) has timely filed her Petition for a writ of certiorari to issue to review the judgment of the Supreme Court of Idaho. Respondent has filed a response, contending: 1. no federal question was decided below; 2. the underlying federal question was not significant.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

I
Federal Question Was Decided By The Idaho Supreme Court

The state district court in its memorandum decision found specifically I.C. §57-724 violated the terms of the trust agreement with the United States and the provision of the State Constitution:

> "This legislatively authorized use of the Fund's assets is clearly not in furtherance of any educational purpose and is therefore incompatible with the terms of the trust agreement with the United States and contrary to the will of the people of Idaho as expressed in their Constitution." (see App. B, p. 30)[1]

The Idaho Supreme Court recognized in its opinion that:

> "The public school endowment fund is a trust, the principal of which is derived primarily from the sale or lease of lands designated exclusively for school purposes. Idaho's admission to the federal Union was conditioned upon the creation of a permanent school fund. Idaho accepted this condition of admission to the union by enacting Article 9, §3 of the Idaho Constitution." (App. A. P. 4a)

The court's holding that there was no violation of Article 9, §3, Idaho Constitution, was a clear declara-

[1] App. refers to the appendix of the Petition for Writ of Certiorari filed in this case.

tion there was no violation of the trust conditions with the United States. It was in effect an interpretation of a federal condition for the admission of Idaho as a State. The Idaho Supreme Court also recognized this in its opinion when it quoted *United States* v. *Fenton*, 27 Supp. 816 (D. Idaho 1939) as follows:

> " 'The express purpose of the Admission Act and the State Constitution is to protect and hold inviolate and intact the fund from the Acts of the Legislature or acts or failures of the officers of the State.' 27 F.Supp. at 818." (App. A, p.5a)

The United States Supreme Court makes its own independent decision whether there was sufficient presentation of a federal question. *Street* v. *New York*, 394 U.S. 576, 584 (1969). The controlling principle is set forth in *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928) where the court states:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Considering the record as a whole, respondent's argument that the Idaho Supreme Court did not pass on any federal question is incorrect. The Supplemental Complaint (App. D, pp.34a-39a) clearly alleges in Paragraph XIII (App. D, p.38a):

> "The failure of * * * the Legislature * * * to supply said losses constitutes a breach of said contract, and constitutes a violation of the Idaho Admission Act and the United States Constitution."

The trial court and The Idaho Supreme Court both considered specifically and by clear intendment whether the contract (Trust) with the United States was breached.

II

The Federal Questions Presented Are Important

The federal questions presented by Petitioner are important. Reviewing state legislation that attempts to alter the trust conditions of a state's admission act for its own benefit is a matter of serious concern. The Court in *Ervien* v. *United States*, 251 U.S. 41, 45-48 (1919) did examine the use of funds by a state which was not in accord with its grant.

In *Ervien*, the Court found the state law was a breach of trust, even though the district court was of the opinion a private proprietor would use trust funds to advertise public lands for sale, and such a wise administration could not be a breach of trust. There were good policy reasons for the *Ervien* decision, as was stated in *United States* v. *New Mexico*, 536 F.2d 1324 (10 Cir. 1976):

> "Because of previous abuses of federal lands granted in trust to the states, the Court observed that it had been Congress' intent 'to preclude any license of construction or liberties of inference'

when construing the Enabling Act. *Ervien* v. *United States*, supra, at 47, 40 S.Ct. at 76."

Respondents contend that interest "gains" were not part of Trust *res* and thus not subject to being left intact. This contention relates to merits of the case and not to whether the federal questions presented are important. It also ignores the plain language in the Idaho Admission Act (App. E, pp. 50a-52a) which makes clear that the proceeds are to be "used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said state." (App. E, p. 52a)

Investment gains are either principal or interest. If principal, they become part of the Trust *res*. Principal gains must under the Admission Act and/or State Constitution, be kept intact and inviolate, and used for the benefit of the beneficiaries, not the state. If investment gains are labeled as interest gains, then they must be used for support of the common schools, not to make up losses the state has solemnly promised to supply.

Respondents' contention that beneficiaries might benefit more if the state did not supply the losses is pure speculation. There is no great predictability in investments, and what investment *might* yield a higher long range profit may be hard to ascertain. However, whatever course the state takes in investments, it has solemnly promised to supply all losses. To allow the state by its law to amend the Admission Act and its own Constitution to say the beneficiaries will make up the losses is unconscionable, as well as a breach of federal trust conditions.

CONCLUSION

The Court should grant the petition for a writ of certiorari. The record as a whole shows the federal claim of invalidity of the state law and the ground for such were brought to the attention of the state court with fair precision and in due time.

The federal questions are important because a violation of trust conditions by a state for its own benefit is a matter of grave concern. The *Ervien* case, and its progency, are clear precedents, that the state shall use its school fund exclusively for education and not to meet the state's duty to supply all losses.

Dated November 16, 1983.

Respectfully Submitted,

Wayne P. Fuller
Special Assistant Attorney General
Post Office Box 130
Caldwell, Idaho 83606

Attorney for Petitioner